

16
No. 90-408-CFX
Status: GRANTED

Title: County of Yakima, et al., Petitioners
v.
Confederated Tribes and Bands of the Yakima Nation

Docketed:
September 5, 1990

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
90-577

Counsel for petitioner: Staffan, John V.

Counsel for respondent: Weaver, Tim

Docket fee recd. 9/6.

Entry	Date	Note	Proceedings and Orders
1	Sep 5 1990	G	Petition for writ of certiorari filed.
2	Oct 5 1990		Brief amici curiae of California, et al. filed. VIDE.
3	Oct 9 1990		Brief amicus curiae of Washington State Association of Counties filed.
4	Oct 9 1990		Brief amici curiae of La Plata County, Colorado, et al. filed.
5	Nov 7 1990		DISTRIBUTED. November 21, 1990
6	Nov 19 1990	F	Response requested -- BRW.
7	Dec 7 1990		Brief of respondent Confederated Tribes and Bands of the Yakima Nation in opposition filed.
8	Dec 12 1990		REDISTRIBUTED. January 4, 1991
9	Jan 7 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
10	Apr 10 1991		REDISTRIBUTED. April 26, 1991
11	Apr 10 1991	X	Brief amicus curiae of United States filed. VIDE.
12	Apr 29 1991		Petition GRANTED. The case is consolidated with No. 90-577, and a total of one hour is allotted for oral argument. *****
14	May 29 1991		Order extending time to file brief of petitioner on the merits until July 1, 1991.
15	Jun 14 1991		Joint appendix filed. VIDE.
19	Jun 27 1991		Brief amici curiae of Montana, et al. filed. VIDE.
16	Jul 1 1991		Brief amici curiae of La Plata County, Colorado, et al. filed. VIDE.
17	Jul 1 1991		Brief amici curiae of National Association of Counties, et al. filed. VIDE.
18	Jul 1 1991		Brief amicus curiae of Washington State Association of Counties filed. VIDE.
20	Jul 1 1991		Brief of petitioners County of Yakima, et al. filed. VIDE.
21	Jul 1 1991		Brief amicus curiae of State of Washington filed. VIDE.
23	Jul 15 1991		Order extending time to file brief of respondent on the merits until August 22, 1991.
24	Jul 22 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Aug 21 1991		Brief of respondent Confederated Tribes and Bands of the Yakima Nation filed. VIDE.
27	Aug 21 1991		Brief of respondent Confederated Tribes and Bands of the Yakima Nation filed. VIDE.

2/14

Entry	Date	Note	Proceedings and Orders
26	Aug 22 1991	Brief amicus curiae of United States filed. VIDED.	
28	Aug 22 1991	Brief amici curiae of Mashantucket Pequot Tribe, et al. filed. VIDED.	
29	Sep 5 1991	SET FOR ARGUMENT TUESDAY, NOVEMBER 5, 1991. (2ND CASE)	
30	Sep 6 1991	CIRCULATED.	
31	Sep 13 1991	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.	
32	Sep 23 1991	X Reply brief of petitioners County of Yakima, et al. filed. VIDED.	
33	Oct 24 1991	* Record filed.	
		* Original record, United States District Court, Eastern District of Washington (1 folder)	
34	Oct 24 1991	* Record filed.	
		* Certified copy of proceedings and briefs, U.S. Court of Appeals, Ninth Circuit.	
35	Nov 5 1991	ARGUED.	

90-408

Supreme Court, U.S.
FILED

SEP 5 1990

JOSEPH F. SPANJOL, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
YAKIMA COUNTY TREASURER,
Petitioners,

v.

CONFEDERATED TRIBES AND
BANDS OF THE YAKIMA NATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. In light of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994, does the validity of state property taxes, upon Indian-owned fee lands within an Indian reservation, expressly authorized by Congress in 25 USC 349 (Indian General Allotment Act, Section 6), depend upon a case by case analysis of the economic, political, and social effects of such tax upon the resident tribe?

2. Is the authority of 25 USC 349 for the taxation of reservation Indians and their fee lands limited to ad valorem taxes, or does it extend to excise taxes on the sale of such fee lands?

PARTIES

The parties to the proceedings below were: petitioners COUNTY OF YAKIMA and DALE A. GRAY in his capacity as Yakima County Treasurer; and respondent CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION, a federally recognized Indian tribe, suing on behalf of itself and its members owning fee-patented lands within the borders of the Yakima Indian Reservation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	14
APPENDIX A	
Ninth Circuit Court of Appeals Amended Decision	1a
APPENDIX B	
Order Denying Rehearing	31a
APPENDIX C	
U.S. District Court Judgment	32a
APPENDIX D	
U.S. District Court Opinion	34a

TABLE OF AUTHORITIES

CASES	Page
<i>Brendale v. Confederated Tribes</i> , 109 S.Ct. 2994 (1989)	<i>passim</i>
<i>Cotton Petroleum v. New Mexico</i> , 109 S.Ct. 1698 (1989)	8
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	6, 7, 13
<i>Mahler v. Tremper</i> , 243 P.2d 627 (Wash., 1952)	12
<i>McClanahan v. Ariz. Tax Comm.</i> , 411 U.S. 164 (1973)	9
<i>Moe v. Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	5
<i>Montana v. United States</i> , 101 S.Ct. 1245 (1981)	7
<i>Oklahoma Tax Comm. v. U.S.</i> , 319 U.S. 598 (1943)	13
<i>U.S. v. Wheeler</i> , 435 U.S. 313 (1978)	9
OTHER AUTHORITIES	
U.S. Constitution, Article I, Sections 8 and 10	12-13
U.S. Constitution, Article VI, Clause 2 (Supremacy Clause)	9
U.S. Treaty with the Yakimas (12 Stat. 951)	3
25 USC 349	<i>passim</i>
Cohens Handbook of Fed. Indian Law, 1942 ed.	6
Cohens Handbook of Fed. Indian Law, 1982 ed.	10
Revised Code of Washington (RCW) 82.45	4
Revised Code of Washington (RCW) 84	4
53 I.D. 133 (June 30, 1930)	6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

 No. —

COUNTY OF YAKIMA and DALE A. GRAY,
 YAKIMA COUNTY TREASURER,
 v. *Petitioners*,
 CONFEDERATED TRIBES AND
 BANDS OF THE YAKIMA NATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT**

The petitioners respectfully pray that a Writ of Certiorari issue to review the Amended Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-named case on June 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 903 F.2d 1207, and is reprinted in the Appendix to this Petition beginning at page 1a. The memorandum decision of the U.S. District Court for the Eastern District of Washington was not reported. It is reprinted in the Appendix to this Petition beginning at page 34a.

JURISDICTION

This action was initiated by the respondent by complaint which invoked the jurisdiction of the federal courts under 28 USC 1331 and 28 USC 1362. Summary judgment in favor of the respondent was entered by the District Court on May 10, 1988. Notice of Appeal of this summary judgment was filed by the petitioners on June 8, 1988.

The order and amended opinion of the Court of Appeals, of which the petitioners now seek review, was issued May 16, 1990, at which time cross-petitions for rehearing were already pending based on the Court's original opinion which had been filed January 9, 1990. The petitions for rehearing were denied by order entered June 7, 1990.

The jurisdiction of this Court is invoked under 28 USC 1254(1) and writ of certiorari is requested under Supreme Court Rule 10.1(c).

STATUTE INVOLVED

This case involves Section 6 of the Act of February 8, 1887 (24 stat. 390), as amended by the Act of May 8, 1906 (34 stat. 182), now codified as 25 USC 349, which reads as follows:

349. Patents in fee to allottees

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of manag-

ing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

STATEMENT OF THE CASE

The Yakima Indian Reservation was established by the Treaty with the Yakimas in 1855. (12 Stat. 951) The Reservation encompasses approximately 1.3 million acres in southeastern Washington State, almost all in Yakima County.¹ On February 8, 1887, Congress passed the Indian General Allotment Act, also known as the Dawes Act, but referred to hereinafter simply as the Allotment Act. The Allotment Act authorized the Secretary of Interior to allot parcels of Reservation land to individual Indians, in trust for a period of 25 years. Following the trust period the allottee could be granted a patent to the allotted land in fee with all restrictions on alienation removed, which then made the allottee subject to the general laws of the state with respect to the land. (25 USC 349 Clause 1) By the Act of May 8, 1906, also known as the Burke Act, the Allotment Act was amended to permit the Secretary to shorten or waive the 25-year allotment trust period and proceed directly to issue fee patents.

Under the authority of the Allotment Act there has been extensive allotment and patenting of lands from within the Yakima Reservation to individual Yakima Indians. As noted by this Court in the recent case of

¹ Opinion of Court of Appeals, 903 F.2d at 1208 (p. 6a, *infra*).

Brendale v. Confederated Tribes, 109 S.Ct. 2994, involving the same reservation and principal litigants as this case, fee patented lands from within the Yakima Reservation now comprise about 20% (or roughly a quarter million acres) of the total. The fee lands are scattered throughout the Reservation area in checkerboard fashion, with substantial clusters in three incorporated towns. 109 S.Ct. at 3000. Some of the fee lands are still owned by Yakima Indians or have been reacquired, by individual members or the Tribe, from intervening owners.

For decades since the passage of the Allotment Act and until the filing of this lawsuit, Yakima County imposed its general property tax upon those lands patented in fee, without restrictions, from within the Yakima Reservation, whether owned by the Yakima Tribe or its members or (as most of the fee lands now are) by non-Indians. Likewise, prior to this lawsuit, Yakima County had long imposed and collected real estate excise tax on the sale of these lands. The general property tax statute is Title 84 of the Revised Code of Washington (RCW 84). The real estate excise statute is Title 82, Chapter 45 of the Revised Code of Washington (RCW 82.45).

In 1987, Yakima County commenced its annual general tax foreclosure proceedings in state court against those real properties throughout the County with 3-year-past-due taxes, including several properties owned in fee by the Yakima Tribe or individual Yakima members. Thereafter on November 9, 1987, the Yakima Tribe, for itself and its members, brought this action in the District Court seeking injunctions against; 1) the foreclosure sale of those tribal-owned and member-owned fee properties within the Reservation; 2) continued imposition of the ad valorem taxes on these lands; and, 3) collection of state excise tax on sales of these properties by the Tribe or its members. The Tribe's substantial theory was that the Congressional authorization for state taxation of Indian fee lands, found in 25 USC 349, was no longer the

law, in view of this Court's decision in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463. Following an agreed order temporarily restraining the foreclosure sales of the Indian properties, the case came before the District Court on cross-motions for summary judgment. The District Court granted summary judgment for the Tribe, accepting the Tribe's theory that, according to *Moe*, the authority for state taxation contained in 25 USC 349 had been effectively made void.

On January 9, 1990, the Court of Appeals, in a generally well-reasoned opinion, reversed the District Court, holding that 25 USC 349 still provides authority for state taxation of Indian-owned fee lands located within the Reservation boundaries. However, based on the checkerboard pattern of land ownership within the Reservation and on a passage concerning tribal zoning rights from Justice White's plurality opinion in the recent case of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 at pg. 3008, it remanded the case for trial on what it called "the Brendale test" (i.e. whether the taxes would seriously impact and imperil the political integrity, economic security, health or welfare of the Tribe). Both parties filed timely petitions for rehearing. The Tribe's petition also requested rehearing en banc. Thereafter, not having previously participated in the case, the United States filed an amicus curiae brief in support of the Tribe's rehearing petition and en banc request. While the rehearing petitions were pending, the Court of Appeals amended its previous opinion as to the excise tax issue, ruling that real estate excise taxes are not within the scope of Sec. 349. The cross-petitions for rehearing were denied by Order entered on June 7, 1990.

REASONS FOR GRANTING THE WRIT

The amended decision of the Court of Appeals, (1) conflicts with the plain language of 25 USC 349, (2) conflicts with the ruling of this Court in *Goudy v. Meath*, 203 US 146 (1906), and (3) misconstrues and misapplies this Court's decision in *Brendale v. Confederated Tribes*, 109 S.Ct. 2994. (4) This misapplication will have serious consequences for many other states, counties and Indian tribes, and (5) involves an important issue of law which has not been but should be settled by this Court.

1. Court of Appeals decision is in conflict with 25 USC 349.

Unconditional taxability of reservation fee lands under 25 USC 349 has been a fact of life for almost a century. 53 I.D. 133 (June 30, 1930); *Cohen's Handbook of Federal Indian Law*, 1942 edition, p. 259. Such taxability is the inescapable result of the issuance of a fee patent and of this language in Sec. 349:

"... and thereafter [i.e. after issuance of the fee patent] all restrictions as to sale, encumbrance, or taxation of said land shall be removed..."

(emphasis added). By imposing a supposed "Brendale test" as a condition upon taxes which Congress has authorized without conditions, the Court of Appeals has invaded the legislative domain and violated 25 USC 349.

2. Court of Appeals decision conflicts with the applicable decision of this Court.

In 1906 this Court decided *Goudy v. Meath*, 203 U.S. 146. The issue in *Goudy* was whether Section 6 of the Allotment Act (now 25 USC 349), in making an Indian fee patent under the Act "subject to the laws, both civil and criminal, of the State . . .", thereby required payment of real estate taxes on the land. The answer of this Court was yes. Liability for real estate taxes on fee

lands is thus a part of fee land ownership for reservation Indians. *Goudy* and the principle it embodies are still the law of the United States. However, the effect of the Court of Appeals remand of this case is to undermine and limit *Goudy*, and with it the authority of this Court.

3. Court of Appeals decision misconstrues and misapplies *Brendale*.

In June 1989, while the instant case was before the Court of Appeals, this Court decided *Brendale v. Confederated Tribes & Bands of Yakima*, 109 U.S. 2994. *Brendale* presented the question whether the Yakima Tribe (rather than Yakima County) had the power to zone two certain parcels of fee land owned by non-Indians (*Brendale* and *Wilkinson*) and located within the Yakima Reservation. Unfortunately there was no majority opinion in *Brendale*. Therefore, extracting any rule from the case and calling it "the *Brendale* test" is unwarranted, at least in the circumstances of this case. Nevertheless, at 903 F.2d 1218 the Court of Appeals inauspiciously introduces its new tax limitation rule by saying, "the [Supreme] Court stated that:", followed by a misquoted² and misapplied passage from the opinion of Justice White in *Brendale*.

The language taken by the Court of Appeals from Justice White's *Brendale* opinion is inappropriate as a rule for the resolution of this case for several reasons. First, the subject of *Brendale* was tribal power and its limits as found in *Montana v. United States*, 101 S.Ct. 1245 (1981). *Montana* involved the power of an Indian tribe to regulate hunting and fishing by non-Indians on fee lands within the reservation and was the point of departure for *Brendale*. The present case, by contrast, involves questions of county power to tax and is therefore no occasion for a transmutation of the kind

² Through an apparent clerical error, the Court of Appeals substituted the words "adverse use" for Justice White's words "adverse effect."

engaged in by the Court of Appeals. Second, in the specific passage from which the Court of Appeals derives its "Brendale test," Justice White discusses the *federally protected* tribal right to object to certain individual uses of non-Indian lands within its reservation. This case on the other hand, concerns *Congress' express removal of the protection* previously enjoyed by the tribe against the taxation of certain Indian lands within the reservation. Third, the potential damage to tribal integrity, economic security, health and welfare, discussed by Justice White, was not the basis for his decision (in favor of the *County* as to both properties) in the *Brendale* case and therefore should not be treated as though it formed the rule or "test" of the case.

Even if the tribal integrity passage of Justice White's opinion can be considered a rule for zoning cases, fundamental differences between zoning and taxation militate against applying such a rule to a tax case. The essence of zoning is the prevention of uses with negative effects on nearby properties. It is thus preventive in nature and local in effect. Property taxation, by contrast, operates directly on the individual property owner, via his property, so as to finance governmental benefits which are not local but enjoyed throughout the taxing entity's jurisdiction. It is essentially remedial, rather than preventive, in nature and non-local in effect. Moreover, if state (or county) and tribal governments have inconsistent zoning schemes, each is destructive of the other. This was recognized implicitly by both the White plurality and the Blackmun minority in *Brendale*. Multiple and differing taxation schemes operating on the same property or activity, however, are common and are legally compatible as recently recognized by this Court in *Cotton Petroleum v. New Mexico*, 109 S.Ct. 1698 (1989). Whatever logic there may be to judging county zoning according to its effect on a neighboring tribal property, there is no such logic to judging county taxes according to their indirect effect on the tribal body politic.

In adapting its own "Brendale test", for the resolution of this case, the Court of Appeals recited the words of Justice White but failed to perceive the legal basis for the tribal interest in political integrity and economic security which the Justice described. Justice White explained, at 109 S.Ct. 3008, that the Supremacy Clause is the basis for protection of tribal interest in zoning. Since the grant of authority in 25 USC 349 is clear, express, unlimited and unconditional, and since the Supremacy Clause makes the acts of Congress the supreme law of the land, Justice White's opinion, if applied to this case, would forbid any remand or factual inquiry in derogation of section 349.

U.S. Wheeler, 435 U.S. 313 (1978) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) teach that it is the applicable acts of Congress which define the limits of state power within Indian reservations, and that legality of state taxation of reservation Indians is judged by the interpretation of these acts and not by platonic notions of Indian sovereignty. The act of Congress applicable to this case is the Allotment Act, Section 6 (now 25 USC 349), and to limit its effect as the Court of Appeals would do is inconsistent with *Wheeler* and *McClanahan*.

The White plurality opinion also counsels against case-specific tests for zoning authority which could result in shifting, transitory powers, engendering uncertainty as to the incidents of land ownership to the detriment of both governments and private land owners. 109 S.Ct. at 3007-3008. Due to the many factual variables in the property tax equation, the "Brendale test" as conceived by the Court of Appeals would create just the kind of chaos which Justice White sought to avoid. Such a test for county tax authority would permit the taxing power to be switched on and off like an electric light, according to circumstances largely within tribal control and totally outside county control.

In sum the effects of *Brendale*, even in the field of reservation zoning, are somewhat unclear owing to the absence of a majority opinion in that case. Now, by its surprising innovation, the Court of Appeals has added confusion to the already complex field of Indian taxation, by converting dicta from a regulatory case into a rule of decision for a tax case.

4. Court of Appeals misapplication of *Brendale* creates serious problems for many states, counties and tribes.

Fee patenting under the Allotment Act was very extensive. Cohen's Handbook on Federal Indian Law, 1982 ed., p. 1380, notes 104, 105. And though Yakima County does not know how much of this fee land is Indian-owned, the volume of future litigation on this question will obviously be enormous unless this Court clarifies the continuing validity of 25 USC 349 as authority for taxation of Indian fee lands. Indeed, several lawsuits are pending through the West on this question, including: *U.S. of A. v. State of South Dakota and Todd County*, U.S.D.C., Dist. of S.D., Central Div., Civ. No. 90-3017; *Blackfeet Tribe et al. v. Ken Nordtvedt, Director, Montana Department of Revenue et al.*, U.S.D.C., Dist. of Montana, No. CV-89-199-GF-PGH; *Assiniboine and Sioux Tribes etc. v. State of Montana*, U.S.D.C., Dist. of Montana, No. CV-89-271-BLG-JFB; *Cross v. State of Washington, et al.*, 9th Cir. Ct. of Appeals, No. 89-35224; *Marvin E. Cook, et al. v. La Plata County Board of Commissioners, et al.*, Colorado State Board of Assessment Appeals, No. 12825.

In no two cases will the consequences of taxing reservation lands be the same for the home tribe. Consider the many factors to be weighed, including: (1) The relative amounts of fee and trust lands within the reservation; (2) the relative amounts of tribal-owned and member-owned fee lands; (3) the rates of tax within the reservation; (4) frequency of tax defaults by tribe members; (5) availability of tribal tax assistance pro-

grams for members; (6) the extent to which the lands to be taxed, or their owners, generate income for the tribe; and (7) the extent to which the lands to be taxed are actually used for tribal purposes. Each of these factors will not only vary from place to place, but also over time, so that if the Court of Appeals decision in this case becomes the law, these same fact questions may have to be litigated every few years as to most if not all the Indian reservations still existing in the United States. If the decision of the Circuit Court is allowed to stand, tribes and their members may or may not benefit. But we can be certain that the rights and burdens of land ownership in large portions of the American West will be thrown into doubt which can only be mitigated through complex and costly litigation, county-by-county, reservation-by-reservation and, year-by-year. The sensible alternative to these accumulating years of lawsuits is to give 25 USC 349 its plain and intended meaning unless and until it is repealed by Congress and to reject any attempt to cut back its effect with a "Brendale test."

Ironically, several of the above factors could be influenced if not controlled by the tribes to detriment of the general public and tribal members.³ Still worse, if and when the lands of a tribe and its members are held exempt from state property taxes, a tax exemp-

³ For illustration, consider a tribe with ample corporate funds with which it carries on tribal welfare programs including loans to members which may be used to meet tax obligations. Such a thriving tribe should be practically unaffected by taxes on member-owned lands and thus, under the Circuit Court's reasoning would therefore itself be denied a tax exemption for its fee lands. If this same tribe depleted its available funds in the acquisition of fee lands within the reservation, cut back welfare and tax loan programs and stood by for the inevitable member defaults, the increasing relative impacts of state taxes on tribal welfare would likely result in valuable tax exemption for the tribe and those members still holding reservation lands, but at the expense of other tribal benefits, not to mention the general public purse.

tion is created in the *person* of each tribe member, which can then be, in effect, sold to non-Indian reservation land owners by the well-known tax planning device of sale-leaseback. Such a pattern of sale-leasebacks of reservation lands would be catastrophic for Yakima County and many other counties throughout the West. From a public policy standpoint, Yakima County believes that Indian tribes should not be rewarded with tax benefits for failing to meet the needs of their members and non-Indian reservation land owners should not be induced to collude with tribe members to avoid property taxes.

5. The issue of excise taxes in this case is an important issue of federal Indian Law which has not been, but should be, answered by this Court.

Inasmuch as the issuance of the fee patent, according to 25 USC 349, subjects the Indian fee lands to taxation and the allottees to the general civil laws of the state, one could easily infer liability of Indian fee owners for real estate excise tax upon sale of their fee lands. However, the Court of Appeals affirmed the District Court on the excise tax issue, reasoning that (1) in rem real estate taxes are authorized by Section 6, (2) the real estate excise tax is not in rem,⁴ and (3) therefore Section 6 does not allow the real estate excise tax. This reasoning is unsound. The precise question to be answered here is whether the "general laws of the state" to which, upon issuance of his patent, an Indian allottee becomes subject, according to 25 USC 349, include real estate excise tax laws.

Excise taxes in the United States have a very long history and indeed are mentioned in Article I, Sections 8

⁴ The Court of Appeals correctly cites *Mahler v. Tremper*, 40 Wash2d 405, 409, 243P2d 627, 629 (1952) for the proposition that the Washington real estate excise is not a tax on the land itself. However, the conclusion drawn by the Court of Appeals requires an additional premise: that *only* in rem taxes are authorized by Section 6.

and 10 of the U.S. Constitution.⁵ Since excise taxes obviously pre-date the Allotment Act, it can be assumed that the general civil laws applicable to a reservation Indian allottee based on issuance of a fee patent, should include the Washington State real property excise statute as well as the Washington general property tax statute, according to the *Goudy* decision. Indeed, under the original Section 6, which was the basis of the *Goudy* decision, the logic of taxing the Indian fee owner on the sale of his land is stronger than that for taxing the land itself, because the original text of Section 6 referred to liability of the allottee rather than of his land. Thus, in using the *subject* of the excise tax (the transferor rather than the item transferred) as its basis for ruling against Yakima County, the Court of Appeals departing from the reasoning, if not indeed the rule, of *Goudy v. Meath*.

In any event, there appears to be no reported case authority (other than this case) from this or any other federal court on the precise question of whether real estate excise taxes are encompassed by Allotment Act Section 6. The most analogous case is *Oklahoma Tax Comm. v. U.S.*, 319 U.S. 598, (1943) wherein the United States challenged Oklahoma's imposition of estate taxes on several deceased Indian estates consisting partly of taxable lands and partly of tax-exempt lands. This Court held that the *transfer* through probate of the *taxable* lands was subject to the Oklahoma estate tax *because* the lands themselves were subject to property tax. Since the Oklahoma tax was, like the Washington real estate excise tax, imposed on a transfer of ownership, *Oklahoma Tax Comm.* provides the best guidance for this case and calls for intervention of this Court to restore needed consistency in this area of Indian law.

⁵ Imposts and duties, referred to in Section 10, are taxes upon the importation and exportation of goods and are therefore within the generic category of excise taxes.

Since real estate excise taxes are widely used for state and county revenue, Yakima County believes this question to be of sufficient importance to deserve a definitive answer from this Court.

CONCLUSION

For the foregoing reasons, this Petition should be granted and a Writ of Certiorari issued herein to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-3926

D.C. No. CV-87-654-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Plaintiff-Appellee,

v.

COUNTY OF YAKIMA; and DALE A. GRAY,
Yakima County Treasurer,
Defendants-Appellants.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding

Argued and Submitted
September 12, 1989—Seattle, Washington

Filed January 9, 1990
Amended May 16, 1990

Before: Eugene A. Wright, J. Clifford Wallace and
David R. Thompson, Circuit Judges.

Opinion by Judge Wallace

SUMMARY

Native Americans

Affirming in part, reversing in part and remanding a judgment of the district court, the court held that in § 6 of the General Allotment Act, Congress consented to permit the state to impose both ad valorem and excise sales taxes against fee patented land owned by members of the Yakima nation.

Appellant Yakima County appealed from the district court's summary judgment in favor of appellee Confederated Tribes and Bands of the Yakima Nation. Pursuant to § 6 of the General Allotment Act, 25 U.S.C. § 349, the County claimed power to impose and levy taxes on fee patented land owned by members of the Yakima Nation and located within their reservation.

[1] As a threshold matter, the court determined that under Washington state law, the issue as to whether Yakima County may tax the patented fee parcels is governed by whether Congress has consented to such a tax. [2] The Yakima Nation contended that a long line of modern cases illustrates a trend against permitting a state to impose regulations or taxes on fee patented lands. These cases, however, do not deal with the taxation of fee patented land and do not constitute a trend against states taxing such land. [3] Nevertheless, this authority is relevant to this case since the holding of each case relies upon one crucial fact, a lack of congressional consent to tax. Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court has consistently held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. [4] The court held that Congress may consent to permit a state to tax fee patented lands

owned by Indians, and then moved on to the inquiry of whether Congress has consented.

[5] Yakima County claimed that Congress has consented to permit the County to tax fee patented land in the provisions of the General Allotment Act and the amendment to that Act. [6] Early in the century, in *Goudy v. Meath*, 236 U.S. 146 (1906), the Court held that the first clause permitted the State of Washington to subject an Indian allottee to real estate taxes. The Yakima Nation conceded that if this case is governed by *Goudy*, the state has the power to tax fee patented land.

[7] Even though the Supreme Court has not ruled on this precise issue presented in this case, the Court's discussion in *Moe*, 425 U.S. 478, still raises a question about the power of states to tax fee patented land pursuant to section 6 of the General Allotment Act. The Court makes two points that form the basis of the Yakima Nation's argument: first, that section 6 is inconsistent with modern congressional policy toward the Indians, and second, that Congress and the courts frown upon the sort of checkerboard jurisdiction the County's taxes would create. [8] The court concluded that the legal effectiveness of section 6 of the General Allotment Act has not been superseded or otherwise rendered void by subsequent statutes. The court acknowledged that the Indian Reorganization Act repudiated the allotment policy, but did not find this repudiation of policy sufficient grounds to refuse to give section 6 its proper legal effect. [9] Checkerboard jurisdiction is the colloquial name given to a pattern of jurisdiction in which the jurisdictional status of land varies from parcel to parcel. It arises, naturally, in the context of an Indian reservation, where federal, state, and tribal jurisdictions are intermingled. Congress and the Supreme Court have frowned upon checkerboard jurisdiction. The question, however, was whether the Court's displeasure with checkerboard jurisdiction means that any taxation scheme which creates such jurisdiction is per se void. [10] In *Moe*, the Supreme Court ex-

pressed its disfavor with checkerboard jurisdiction in the specific factual context it was addressing, but it did not rule upon the specific question of whether checkerboard jurisdiction is permissible under a state's scheme of taxing patented land. [11] More recently in *Brendale*, 109 S. Ct. at 3008, the Court again rejected a per se approach to checkerboard jurisdiction and further refined the analysis that should be used in cases involving checkerboard jurisdiction. [12] The district court should apply the *Brendale* test on remand. [13] The court affirmed summary judgment in favor of the Yakima Nation insofar as it relates to excise taxes sought to be imposed by the County.

COUNSEL

John V. Staffan, Deputy Prosecuting Attorney, Yakima, Washington, for the defendants-appellants.

Tim Weaver, Cockrill, Weaver & Bjur, P.S., Yakima, Washington, for the plaintiff-appellee.

ORDER

The opinion filed the above case on January 9, 1990, is amended as follows:

The last sentence of the first paragraph of the opinion on slip op. 246 is amended to read as follows: "We affirm in part, reverse in part, and remand to the district court for further proceedings."

Part VII and the last line of the opinion on slip op. 269-70 are deleted and the following is inserted in its place:

VII

Finally, the Yakima Nation attempts to distinguish between the validity of the ad valorem taxes and the real property excise taxes imposed by Yakima County. Since the taxes are not taxes upon activities taking place upon the land, they are distin-

guishable from the taxes at issue in *McClanahan, Mescalero, Moe, and Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980). However, further analysis of the real property excise tax is necessary.

The State of Washington's statutory scheme, which provides for satisfaction of real property excise sales taxes through ultimate recourse to the land, see Wash. Rev. Code chs. 82.45.070 and 82.46.040 (1962 and Supp. 1989), suggests that the excise tax at issue here qualifies as "taxation of said land" within the meaning of 25 U.S.C. § 349. Nevertheless, the Washington Supreme Court has stated that "a tax upon the sales of property is not a tax upon the subject matter of that sale." *Mahler v. Tremper*, 40 Wash. 2d 405, 409, 243 P.2d 627, 629 (1952). Since we hold only that in section 6 of the General Allotment Act, Congress consented to permit the County to impose taxes against fee patented land, we cannot hold that section 6 permits the County to impose an excise tax that has specifically been held by the state supreme court *not* to be a tax upon the land. We therefore affirm the district court's summary judgment in favor of the Yakima Nation insofar as it relates to the excise taxes sought to be imposed by the County.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

OPINION

WALLACE, Circuit Judge:

Yakima County appeals from the district court's summary judgment in favor of the Confederated Tribes and Bands of the Yakima Nation (Yakima Nation). Pursuant to section 6 of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 349 (General Allotment Act),

the County claims power to impose and levy taxes on fee patented land owned by members of the Yakima Nation and located within their reservation. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand to the district court for further proceedings.

I

The policy behind the General Allotment Act and similar allotment acts was "the gradual extinction of Indian reservations and Indian titles" through a process of steady assimilation. *Draper v. United States*, 164 U.S. 240, 246 (1896). In particular, the General Allotment Act was designed to provide for the "breaking up, as rapidly as possible, of all the tribal organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship." *United States v. Mitchell*, 445 U.S. 535, 544-45 n.5 (1980), quoting Statement of Rep. Perkins, 18 Cong. Rec. 191 (1886); see generally D. Getches, D. Rosenblatt, and C. Wilkinson, *Federal Indian Law* 69-79 (1979). Under this statutory scheme of allotments, a number of Indians on the Yakima Indian Reservation, and the Yakima Nation itself, own land patented in fee. This case concerns the power of the State of Washington to levy and collect ad valorem and excise sales taxes upon such land.

The Yakima Indian Reservation consists of approximately 1,300,000 acres of land located almost entirely in Yakima County in the eastern part of Washington State. There are approximately 7,600 enrolled members of the Yakima Nation. One hundred four of these members own a total of 139 parcels of fee-patented land within the Yakima Indian Reservation. The Yakima Nation also has ownership interest in some of the fee lands.

Prior to the commencement of this action, Yakima County routinely levied and collected ad valorem taxes on

the fee patented parcels pursuant to Title 84 of the Revised Code of Washington. Wash. Rev. Code chs. 84.52, 84.56 (1962 and Supp. 1989). The County also collected real estate excise taxes upon the sale of these properties pursuant to Wash. Rev. Code ch. 82.42 (1962 and Supp. 1989). Yakima County claims authority to tax these parcels pursuant to section 6 of the General Allotment Act. The County claims the power to tax only fee patented land; it does not claim the power to tax land held in trust for the Indians by the federal government or land with other restrictions on alienation.

On November 9, 1987, the Yakima Nation, on its own behalf and on behalf of its members owning fee patented parcels of land within the reservation, brought an action in the United States District Court for the Eastern District of Washington requesting a declaratory judgment stating that the taxes imposed by Yakima County were inconsistent with applicable federal law. The Yakima Nation also requested an injunction against the further levy or collection of taxes by the County. The Yakima Nation brought this action in response to efforts by Yakima County to sell 28 parcels of the fee patented land at a tax sale. Shortly after the lawsuit was commenced, the district court entered an order restraining the tax sales.

The district court granted summary judgment in favor of the Yakima Nation. Essentially, the district court based its decision upon two interrelated grounds. First, the court reasoned that while the tax is seemingly permitted under the terms of the General Allotment Act, that act is "inconsistent" with the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, codified at 25 U.S.C. § 461 *et seq.* (Indian Reorganization Act), and therefore without legal effect. Second, the district court found that "[t]he map entered as an exhibit by stipulation of the parties clearly demonstrates the checker-board effect of the imposition of ad valorem property

taxes upon the fee patented land." The court reasoned that this "checkerboard jurisdiction" was prohibited by the Supreme Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (*Moe*).

We review a district court's entry of summary judgment de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989). Our review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

II

[1] As a threshold matter, we must examine whether Yakima County is empowered to levy these taxes under Washington state law. The ad valorem and excise tax provisions of the Revised Washington Code constitute a positive statutory grant of authority to the County to impose such taxes upon land within its jurisdiction. See Wash. Rev. Code chs. 82.45, 84.52, 84.56 (1962 and Supp. 1989). The Yakima Nation contends that Washington's state constitution forbids these taxes. Article XXVI of the Constitution of the State of Washington provides:

That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held of any Indian or Indian tribes; . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . and . . . no taxes shall be imposed by the state on lands or properties therein,

belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such extent as such act of congress may prescribe.*

(Emphasis added.) This Article expressly permits the state to tax certain lands owned by Indians who have severed their tribal relations, but it does not speak directly to the issue of whether the state may tax fee patents lands owned by Indians who have retained their tribal affiliations. Rather, the Article states that "said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." *Id.* (emphasis added). This plainly suggests that Congress may give its consent to the states to tax Indian lands. Indeed, this is the interpretation the Supreme Court of Washington gave to the clause in the context of other federally controlled land. In *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 663, 171 P.2d 838, 845 (1946), that court interpreted Article XXVI to mean that "Federal property shall be taxed by this state when consent is given by the Congress of the United States." We are bound to defer to the judgment of a state's highest court in interpreting a state statute or constitution. 28 U.S.C. § 1652; *Tom v. Sutton*, 533 F.2d 1101, 1106 (9th Cir. 1976). Therefore, under *Boeing*, Congress may permit the state to tax federally controlled land, including Indian land. We conclude that, under Washington state law, the issue as to whether Yakima County may tax the

patented fee parcels is governed by whether Congress has consented to such a tax.

III

[2] The test stated by the Washington Supreme Court in *Boeing*—whether or not Congress has consented to permit a state to tax—is also the one used by the Supreme Court in its cases dealing with state taxation and regulation of Indian affairs. The Yakima Nation contends that a line of modern cases illustrates a trend against permitting a state to impose regulations or taxes on fee patented lands. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (*Cabazon Band*) (County may not apply Bingo and gambling ordinances against reservation); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (*Blackfeet Tribe*) (State may not tax oil, gas, and other mineral royalties derived from reservations lands); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976) (*Bryan*) (County may not impose tax upon mobile home located on trust land); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (*McClanahan*) (state has no jurisdiction to impose tax upon income derived wholly from reservation sources). These cases, however, do not deal with the taxation of fee patented land, and thus do not constitute a “trend” against states taxing such land.

[3] Nevertheless, this authority is relevant to the case before us since the holding of each case relies upon one crucial fact—a lack of congressional consent to tax. See *Cabazon Band*, 480 U.S. at 207 (holding that Public Law 280, 67 Stat. 588 (1953), as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955, did not express congressional consent for the state to regulate Bingo and stating that “state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided”); *Blackfeet Tribe*, 471 U.S. at 759, 765 (holding that a state’s power to tax gas, oil, and mineral royalties on Indian land pursuant to the Act of

May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. § 398, was repealed by a later Act of Congress, the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396a, *et seq.*, and stating that “[i]n keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians’ exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.”); *Bryan*, 426 U.S. at 373, 377 (holding that § 4 of Pub. L. 280 does not manifest congressional consent to tax and stating that “*McClanahan* and *Moe* preclude any authority in respondent county to levy a personal property tax upon petitioner’s mobile home in the absence of congressional consent” and “[o]f special significance for our purposes . . . is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations.”); *McClanahan*, 411 U.S. at 171-72 (finding no authority under which the state of Arizona could tax and stating, “[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”), quoting *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); see also *Rice v. Rehner*, 463 U.S. 713, 734-35 (1983) (finding that “application of state [liquor licensing] law is ‘specifically authorized by . . . Congress . . . and does not interfere with federal policies concerning the reservations.’”), quoting *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (tax imposed by the State of New Mexico on the gross receipts of a tribe operating an off-reservation ski resort upheld because the resort was located off reservation property, citing *McClanahan*, and stating that “in the special area of state taxation, ab-

sent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income") (emphasis added).

[4] These cases uniformly support the conclusion that Congress may consent to permit a state to tax Indians. We therefore hold that Congress may consent to permit a state to tax fee patented land parcels owned by Indians. Our inquiry is thus whether Congress has consented. We do not decide the precise quantum of consent that is required because we conclude that 25 U.S.C. § 349 manifests Congress's "unmistakably clear" intent to permit states to tax fee patented land. *Blackfeet Tribe*, 471 U.S. at 765.

IV

[5] Yakima County claims that Congress has consented to permit the County to tax fee patented land in the provisions of the General Allotment Act, and the amendment to that Act promulgated in the Act of May 8, 1906, ch. 2348, 34 Stat. 182 (the 1906 Amendment), both of which are now codified at 25 U.S.C. § 349. Section 349 provides, in part, that:

when the lands have been conveyed to the Indians by *patent in fee*, . . . then each and every allottee shall have the benefit of *and be subject to* the laws, both civil and criminal, of the State or Territory in which they may reside. . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a *patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed*

25 U.S.C. § 349 (emphasis added).

A.

We begin by examining the statutory language, which is, on its face, reasonably clear. Allottees, after the land is conveyed in fee, are made "subject to" the laws of the state in which they live. *Id.* Moreover, the language following the word "*Provided*," which was added by the 1906 Amendment, states explicitly that "all restrictions as to . . . *taxation of said land* shall be removed." *Id.* (emphasis added). We judge that Congress's decision to mention taxation specifically as one of the restrictions that would be removed upon conveyance in fee manifests a clear intention to permit the state to tax. It is also clear that the power of the state to tax under the language of the 1906 Amendment is confined to taxation of the fee patented *land*. Thus, by its own terms, 25 U.S.C. § 349 expressly permits the County to tax fee patented land. This would ordinarily end our discussion of this issue. However, the seemingly clear language of 25 U.S.C. § 349 is now less clear due to subsequent statutes and court decisions. We must therefore examine governing cases for guidance as to the proper interpretation of Section 6.

B.

[6] Early in the century, the Supreme Court construed the General Allotment Act to permit states to tax fee patented land. In *Goudy v. Meath*, 203 U.S. 146, 149 (1906), the Court construed the first clause of 25 U.S.C. § 349: "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they may reside." The Court held that this clause permitted the State of Washington to subject an Indian allottee to real estate taxes under the General Allotment Act. *Id.* at 149-50. The Yakima Nation concedes that if this case is governed by *Goudy*, the state has the power to tax fee patented land. *Goudy* has not been specifically reversed by the Supreme Court.

The Supreme Court decided *Goudy* without benefit of the language added to the statute by the 1906 Amendment, which declared, in the first proviso, that after a fee patent has been issued, "all restrictions . . . as to taxation of said land shall be removed." The Supreme Court construed this language in *Squire v. Capoeman*, 351 U.S. 1 (1956) (*Capoeman*). The Court held that the sale of timber standing on allotted forest land held in trust could not be subjected to a federal capital gains tax. *Id.* at 2, 10. The Court reached its conclusion, in part, by interpreting section 6 of the General Allotment Act as permitting taxation only *after* the land had passed out of trust or restricted alienation status. Construing the 1906 Amendment, the Court explained that:

The literal language of the proviso [section 6] evinces a congressional intent to subject an Indian allotment to *all* taxes only *after* a patent in fee is issued to the allottee. This, in turn, implies that *until such time as the patent is issued*, the allotment shall be free from all taxes . . .

Id. at 7-8 (emphasis added). The Court's construction in *Capoeman* of the statute independently reinforces the interpretation given to it in *Goudy*: the state may not tax while the land is held in trust or restriction, but is free to tax *after* the land had been patented in fee. We hold that the unambiguous statutory language contained in 25 U.S.C. § 349, and the interpretation given to it in *Goudy* and *Capoeman*, manifest Congress's clear intention to permit the states to tax fee patented land owned by Indian tribes or their members.

The Yakima Nation urges us to apply the rule of construction pronounced by the Supreme Court in *McClanahan* that "[d]oubtful expressions [of statutory or other language] are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and food faith." *McClanahan*, 411 U.S. at 164, 174, quoting *Carpenter v. Shaw*, 280

U.S. 363, 367 (1930). This rule requires us to construe ambiguous statutory language in favor of the Indians. But this rule of construction is irrelevant here where the statutory language is unambiguous. *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

C.

Apparently, the district court, quoting *Capoeman*, 351 U.S. at 8, initially agreed with our interpretation, stating that "[a]t first glance, it would seem that 'the literal language of the proviso [section 6] evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.[']'" However, the court went on to decide, and the Yakima Nation now argues, that the state tax is disallowed because of statutes enacted and cases decided after 1906 which have rendered the statute and the interpretation given it in *Goudy* (and, presumably, *Capoeman*) void. This view finds its strongest support in the Supreme Court's decision in *Moe*, 425 U.S. at 477-78.

Moe involved a challenge by the Salish and Kootenai Tribes to the State of Montana's imposition and levy of cigarette sales taxes and personal property taxes upon tribal members on the Flathead Reservation. *Id.* at 465. The Court held that the taxes, as applied to the Indians, were barred by the supremacy clause and by the Court's decisions in *McClanahan* and *Mescalero*. *Id.* at 480-81. In the course of its opinion, the Court addressed the State of Montana's claim that section 6 of the General Allotment Act and the *Goudy* decision permitted it to impose the taxes. *See id.* at 477. The Court found this argument "untenable." *Id.* at 478. The Court reasoned that,

[b]y its terms § 6 does not reach Indians residing or producing income from lands held in trust for the Tribe, which make up about one-half of the land area of the reservation. If the General Allotment Act itself establishes Montana's jurisdiction as to those

Indians living on "fee patented" lands, then for all jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size.

425 U.S. at 478.

The meaning of this passage is not altogether clear. The first sentence of the passage suggests, at a minimum, that section 6 does not apply to *Indians residing on trust land*. This is plainly true, particularly in light of the language added by the 1906 Amendment, which speaks only of the "taxation of said [fee patented] *land*." 25 U.S.C. § 349 (emphasis added). The language of the 1906 Amendment does not encompass a tax unrelated to the land, nor does it contemplate the taxation of trust land—it only permits the taxation of fee patented land.

The second sentence of the passage quoted above goes on to discuss the provisions of the General Allotment Act as they relate to fee patented lands. The district court and the Yakima Nation apparently read this sentence to mean that a state may not tax fee patented land pursuant to section 6 under any circumstances. We disagree with this reading.

In *Moe*, the Court appears to have considered only the first part of the statutory language contained in 25 U.S.C. § 349, which states that "when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . ." 25 U.S.C. § 349. This observation is supported by the fact that the Court cites only *Goudy*, which construed only *this* language, and not *Capoeman*, which construed the language added to the statute in 1906. Under the language contained in the first clause of 25 U.S.C. § 349, the state's jurisdiction would seem to be general—applying

to all the activities of an Indian allottee. The Court points out that the General Allotment Act could not convey such broad jurisdiction to the states since general state jurisdiction over the Indians has been repudiated by later statutory schemes and because it raises the specter of checkerboard jurisdiction. 425 U.S. at 478-79. Yet the Court does not refer to or address the more specific language added by the 1906 Amendment, language that refers only to the taxation of the fee patented land. We view this omission as indicating that the Court did not purport to address this issue in *Moe*.

Thus, while the Court's holding in *Moe* can plausibly be read to discredit the "subject to" language in 25 U.S.C. § 349 and the interpretation given to it in *Goudy*, it cannot be read to affect the "all restrictions . . . removed" language and the interpretation given to that language in *Capoeman*. As stated earlier, the language that is found in the first proviso of 25 U.S.C. § 349 explicitly refers only to the taxation of fee patented *land* and "evinces a congressional intent to subject an Indian allotment [of land] to all taxes only after a patent in fee is issued to the allottee." *Capoeman*, 351 U.S. at 8. Yet the facts in *Moe* involved the taxation of activities unrelated to the land: the sale of cigarettes and the ownership of personal property by the Indians themselves. Montana claimed to tax these non-land items pursuant to section 6 of the General Allotment Act. The Court responded to this contention by hypothesizing that "[i]f the [Act] *itself* establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands," rather than the fee patented lands *themselves*, "then for all jurisdictional purposes," rather than just land taxing purposes, "the Flathead Reservation has been substantially diminished in size." *Moe*, 425 U.S. at 478 (emphasis added). Clearly the Court is not talking about a tax imposed upon fee patented *land* in this sentence. Rather, the Court merely refutes the State of Montana's theory that section 6 of the General Allotment Act con-

stitutes a *general* grant of jurisdiction to the states to impose taxes on Indians.

We conclude that the *Moe* decision holds that a state cannot impose taxes pursuant to 25 U.S.C. § 349 upon the activities of Indians residing on fee patented property that are unrelated to the status of the land. We therefore determine that *Moe* did not rule upon the applicability of section 6 to state taxation of fee patented land. See Cohen's Handbook of Federal Indian Law 410-11 (1982) (Discussing *Moe* and stating that "[w]hether the quoted language [referring to the "all restrictions . . . removed" language] of section 6 authorizes state taxation of land patented in fee under the section and located within tribal Indian country *has not been judicially determined.*") (emphasis added).

[7] Even though the Supreme Court has not ruled on the precise issue presented in this case, the Court's discussion following the above-quoted passage still raises a question about the power of states to tax fee patented land pursuant to section 6 of the General Allotment Act. The Court makes two points, which form the basis of the Yakima Nation's argument: first, that section 6 of the General Allotment Act is inconsistent with modern congressional policy toward the Indians and, second, that Congress and the courts frown upon the sort of checkerboard jurisdiction the County's taxes would create. We address each point in turn.

V

We first address whether the General Allotment Act has any continuing legal vitality. In its opinion, the district court stated that, "the General Allotment Act, particularly section 6, is inconsistent with the subsequent Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*" Both parties raise the question of whether the Yakima Nation is covered by the Indian Reorganization Act. The Yakima Nation apparently contends that it is

covered by the Act; Yakima County asserts that it is not. This is an evidentiary issue that was not raised in the district court and we therefore decline to address it here. *United States v. Oregon*, 769 F.2d 1410, 1414 (9th Cir. 1985); see also *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978).

The provisions of the Indian Reorganization Act determine whether a particular parcel of land is to be considered fee or trust land, but they do not deal with whether fee land may be taxed. See 25 U.S.C. § 461 *et seq.* All that Yakima County contends on appeal is that, as a matter of law, it may tax fee patented land. For purposes of this appeal, we need only consider whether the Indian Reorganization Act has terminated the legal effectiveness of the General Allotment Act as it relates to the taxation of fee land.

The district court relied primarily upon the Supreme Court's decision in *Moe* for its conclusion that section 6 of the General Allotment Act is inconsistent with the Indian Reorganization Act and thus obsolete. In *Moe*, the Supreme Court suggested that the *policies* of the General Allotment Act had been abandoned in the mid-1930's: "The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act" *Moe*, 425 U.S. at 479, *quoting* *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) (*Mattz*). It is true that the federal government's policy towards the Indians changed quite dramatically with the passage of the Indian Reorganization Act. See generally W. Canby, Jr., *American Indian Law* 23 (1988) ("The Indian Reorganization Act was based upon the assumption, quite contrary to that of the Allotment Act, that the tribes not only would be in existence for an indefinite period, but that they *should* be."). Among other changes, allotments of land ceased and any Indian land which was held in trust by the federal government or upon which restrictions of alienation were imposed was to be con-

tinued in trust indefinitely. *See, respectively*, 25 U.S.C. § 461 and § 462. While these two statutes evidence a change in policy, they do not affect the continuing legal validity of section 6 of the General Allotment Act as it relates to the taxation of lands already patented in fee. All that Yakima County claims power to tax is land that has been patented in fee, not land that continues in trust. Nor do the other congressional acts mentioned by the Yakima Nation in its brief affect the continuing validity of section 6. While these acts perhaps evidence a further move away from the policy of allotment towards the policy of tribal self-government, their provisions do not expressly or even implicitly repeal section 6. A mere repudiation of *policy* by Congress is insufficient to render a statute legally void. We must give effect to a statute absent a showing that it has been repealed. *See FAA v. Robertson*, 422 U.S. 255, 266 (1975); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Valid statutes cannot be repealed by judicial fiat. We do not construe Supreme Court cases as having done so.

The Yakima Nation also argues that 18 U.S.C. § 1151 is authority for precluding taxation. This statute defines "Indian country" for purposes of criminal jurisdiction as encompassing "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 18 U.S.C. § 1151(a). The broad definition of "Indian country" in this statute reflects an attempt by Congress to "remove the uncertainty" as to the limits of federal criminal jurisdiction over Indian territory. *Hilderbrand v. Taylor*, 327 F.2d 205, 206 (10th Cir. 1964).

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 (1962), the Court held that, pursuant to 18 U.S.C. § 1151, federal criminal jurisdiction applied to all fee patented land found on an Indian reservation. *See also Mattz*, 412 U.S. at 504. Yet, while we acknowledge that section 1151 governs fee

patented land for purposes of criminal jurisdiction, we do not consider section 1151 relevant to the question of whether fee patented land may be taxed by the state. The taxing power is an exercise of the state's civil, rather than its criminal, authority, and is governed by a non-criminal federal statutory scheme of which 25 U.S.C. § 349 is a part. The Court's decision in *Seymour* thus cannot be read as revoking the state's power to tax fee patented lands under the General Allotment Act. Rather, the *Seymour* decision reflects a straightforward application of a statutorily enacted congressional policy pertaining to criminal jurisdiction within Indian reservations. We conclude that 18 U.S.C. § 1151 does not disallow Yakima County's taxing power under 25 U.S.C. § 349.

Finally, the Yakima Nation contends that 25 U.S.C. § 608(c) does not permit Yakima County to tax fee patented lands. 25 U.S.C. § 608(c) (Supp. 1989), amended Nov. 1, 1988, Pub. L. 100-581, Title II, § 213, 102 Stat. 2941. 25 U.S.C. § 608(a)(1) empowers the Secretary of the Interior to purchase land within the Yakima Indian Reservation or the area the Tribe ceded to the United States. The amended version of section 608(c) states that lands acquired "pursuant to section (a)(1) of this Act . . . shall be held *in trust* by the United States for the benefit of the Yakima Indian Nation." (Emphasis added.) Since Yakima County does not claim authority to tax lands held in trust, we do not need to address whether the County can tax lands under this provision.

[8] We conclude that the legal effectiveness of section 6 of the General Allotment Act has not been superseded or otherwise rendered void by subsequent statutes. Although we acknowledge that the Indian Reorganization Act repudiated the allotment policy, we do not find this repudiation of policy sufficient grounds to refuse to give section 6 its proper legal effect. The comments of the Court in *Moe* regarding the General Allotment Act merely take

note of the change in policy that has ensued, particularly in reference to the statutory language construed by the Court in *Goudy*. Yet these statements do not purport to render the General Allotment Act totally ineffective.

Our determination as to the continuing vitality of section 6 is guided in part by two Supreme Court decisions rendered after *Moe*. In *Montana v. United States*, 450 U.S. 544 (1981), the Court held that the Crow Indian Tribe of Montana did not have the power to regulate hunting and fishing carried on by nonmembers of the tribe on fee land. In the course of its opinion, the Court acknowledged that "the *policy* of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act." *Id.* at 560 n.9 (emphasis added) (citation omitted). Yet the Court went on to say that "what is relevant in *this case* is the effect of the land alienation *occasioned by that* [allotment] *policy* on Indian treaty rights tied to Indian use and occupation of reservation land." *Id.* (emphasis added). The Court thus inferred that although the allotment policy had been abandoned, the legislative effects spawned by that policy still must be evaluated for their continuing legal relevance.

Recently, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 109 S. Ct. 2994, 3004 (1989) (*Brendale*), the Supreme Court responded to a similar challenge by the Yakima Nation to the continuing validity of the General Allotment Act involving the zoning the non-Indian lands:

The Yakima Nation argues that we should not consider the Allotment Act because it was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984. But the Court in *Montana* was well aware of the change in Indian policy engendered by the Indian Reorganization Act and *concluded that this fact was irrelevant*. Although the Indian Reorganization Act may have ended the allotment of further lands, it

did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from passing to non-Indians.

(Emphasis added.) We follow *Brendale* in rejecting the Yakima Nation's argument that the legal effectiveness of the General Allotment Act has been repudiated. *Montana* and *Brendale* both qualify the harsh manner in which the Court in *Moe* discussed the continuing legal effectiveness of the General Allotment Act. We conclude that although the Indian Reorganization Act may have altered the policy of allotting lands to the members of Indian tribes, it did not eviscerate the legal effectiveness of section 6 of that Act as it applies to fee patented land.

VI

[9] Having decided that the General Allotment Act is still good law, we now turn to the district court's second, interrelated reason for granting summary judgment to the Yakima Nation: the checkerboard jurisdiction that would result from finding that Yakima County had power to tax. Checkerboard jurisdiction is the colloquial name given to a pattern of jurisdiction in which the jurisdictional status of land varies from parcel to parcel. It arises, naturally, in the context of an Indian reservation, where federal, state, and tribal jurisdictions are intermingled. Because of the administrative difficulties such a scheme of jurisdiction creates, as well as its tendency to frustrate the goals of tribal autonomy and jurisdictional uniformity, Congress and the Supreme Court have frowned upon checkerboard jurisdiction. See *Moe*, 425 U.S. at 478-79. The question before us, however, is whether the Court's displeasure with checkerboard jurisdiction means that any taxation scheme which creates such jurisdiction is per se void.

The Supreme Court first coined the term "checkerboard jurisdiction" in 1962 in *Seymour*, which involved the habeas corpus claim of an Indian burglar who had been convicted and imprisoned by the State of Washington. As discussed above, resolution of the case required the Court to construe 18 U.S.C. § 1151, the statute governing criminal jurisdiction over Indian country. Section 1151 provides in part that: "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent" 18 U.S.C. § 1151. The State of Washington contended that this language did not apply to fee patented land. The Court disagreed, stating that "such an impractical pattern of checkerboard jurisdiction [as urged by the state] was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate the confusion Congress specifically sought to avoid." 368 U.S. at 358 (emphasis added). It is apparent from this quotation that the Court's refusal to sanction checkerboard jurisdiction was driven by its construction of the statutory language of section 1151 and the congressional intent manifested in that statutory language. The use of the term "checkerboard jurisdiction" in *Seymour* is thus confined to an interpretation of section 1151.

That interpretation, we conclude, does not have general applicability in the civil context. Section 1151, by its own terms is a criminal statute. See 18 U.S.C. § 1151 (referring to "the term 'Indian country', as used in this chapter") (emphasis added). Moreover, Congress could have, but chose not to extend the federal government's jurisdiction to address the problem of checkerboard jurisdiction in the civil context. See W. Canby, *American Indian Law* at 166 ("The federal role in adjudication of civil disputes in Indian country is far more

limited than its role in criminal matters."). Thus, the use of the term "checkerboard jurisdiction" in *Seymour* does not, by itself, support the Yakima Nation's position that such jurisdiction is void with regard to state taxation of fee patented land.

[10] In *Moe*, the Supreme Court discussed the problem of checkerboard jurisdiction as it relates to state taxation of Indians. In rejecting the State of Montana's claim that it could collect sales and personal property taxes pursuant to 25 U.S.C. § 349, the Court reasoned, in part, that such taxes would create an impermissible situation of checkerboard jurisdiction. *Moe*, 425 U.S. at 479. As discussed earlier, however, the Court did not reach the question of whether the state could tax the fee patented land itself. The Court therefore did not directly confront the question of whether checkerboard jurisdiction is permissible in the context of a state's taxation of fee patented land. Nevertheless, the Court's rejection of checkerboard jurisdiction in the specific context it was addressing is significant. We conclude, however, that although the Court expressed its disfavor with checkerboard jurisdiction in the specific factual context it was addressing, it did not rule upon the specific question of whether checkerboard jurisdiction is permissible under a state's scheme of taxing fee patented land.

The Court in *Moe* proclaimed that "Congress, by its more modern legislation has evinced a clear intent to eschew any 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *Id.* The Indian Reorganization Act and subsequent statutes can indeed be read as displaying Congress's intent to move away from the problems of fractured jurisdiction on Indian reservations. And, of course, the Supreme Court is bound to follow this modern trend of legislation. We cannot, however, render an otherwise valid statute invalid simply because it does not conform to a modern legislative trend. Nor do

we read the Court's opinion in *Moe* as requiring us to do so.

The Court in *Moe* relied upon *Seymour* as authority for prohibiting the states from taxing cigarette sales and personal property in a manner that would create checkerboard jurisdiction. But as discussed, the Court's holding in *Seymour* was limited to the construction of a statute that gave the federal government general *criminal* jurisdiction. See 18 U.S.C. §§ 1151, 1152. The Court apparently cited *Seymour* to illustrate the dangers in permitting checkerboard jurisdiction in the context of a *general* claim of state jurisdiction on the civil side. The Court was concerned that permitting the state to tax *any* activity pursuant to the General Allotment Act would create checkerboard jurisdiction "for *all* jurisdictional purposes." *Moe*, 425 U.S. at 478. Yet, the Court does not address the more limited question of checkerboard jurisdiction that is created when states tax only fee patented *land*. The Court's holding thus cannot be read to establish a *per se* rule against checkerboard jurisdiction in the context of state taxation and does not speak to the issue of whether such jurisdiction is permissible in the context of a state tax imposed upon fee patented *land*.

Our conclusion that *Moe* does not establish a *per se* rule against checkerboard jurisdiction is supported by two Supreme Court cases decided after *Moe*. In *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U.S. 463 (1979), the Court clarified its stance on checkerboard jurisdiction while upholding the State of Washington's assumption of partial civil and criminal jurisdiction over the Yakima Nation. Responding to the Yakima Nation's argument that the checkerboard jurisdiction that would ensue from such an arrangement violated the equal protection clause of the fourteenth amendment, the Court stated that "the lines the state has drawn may well be difficult to administer.

But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction." *Id.* at 502. The Court concluded that the fact that Washington's assumption of jurisdiction would create checkerboard jurisdiction was irrelevant and did not violate equal protection. *Id.* Such casual treatment of checkerboard jurisdiction in this context hardly comports with a *per se* prohibition on checkerboard jurisdiction grounded in the "intent embodied in the existing federal statutory law of Indian jurisdiction." *Moe*, 425 U.S. at 478.

[11] More recently, in *Brendale*, the Court again rejected a *per se* approach to checkerboard jurisdiction and further refined the analysis that should be used in cases involving checkerboard jurisdiction. The Court stated that:

in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But, . . . that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse use on the tribe. *The impact must be demonstrably serious and must imperil the political integrity, economic security or the health and welfare of the tribe.* This standard will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners.

Brendale, 109 S. Ct. at 3008 (emphasis added).

[12] The district court did not have the benefit of the Court's decision in *Brendale* and thus did not apply this test. The Yakima Nation presented evidence of how the

checkerboard jurisdiction that would result from Yakima County's taxation would affect it in a demonstrably serious way, but the district court did not make its decision based on this evidence; instead it found a per se bar on checkerboard jurisdiction. The district court should apply the *Brendale* test on remand.

Finally, the parties did not argue or bring to our attention our case of *Ashcroft v. United States Department of the Interior*, 679 F.2d 196 (9th Cir. 1982) (*Ashcroft*), cert. denied, 459 U.S. 1201 (1983). There, we held that the United States Bureau of Indian Affairs could enforce commercial regulations against non-Indians conducting business upon fee lands within the Indian reservation. As part of our reasoning, we stated that "application of the regulations to fee land within the reservation is necessary to effect legislative intent." *Id.* at 200. In support of this statement we commented that,

[i]n *Moe v. Confederated Salish and Kootenai Tribes*, the Supreme Court held that Montana could not tax fee land within a reservation because "checkerboard jurisdiction," a result "contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction," would result.

Id., quoting *Moe*, 425 U.S. at 478. Our statement is somewhat broad because, as discussed above, the Court's holding in *Moe* did not reach the question of whether the state could tax fee land, and *Moe* does not, as *Ashcroft* might be read to suggest, establish a per se rule against checkerboard jurisdiction.

However, we need not pursue further an interpretation of this language. To the extent it might be interpreted as inconsistent with our opinion, such an interpretation would be undercut by the subsequent Supreme Court *Brendale* decision.

In *Ashcroft*, we apparently read *Moe* as precluding checkerboard jurisdiction in all matters relating to fee patented land. We reasoned that checkerboard jurisdiction was per se impermissible because it violated "the existing federal statutory law of Indian jurisdiction." *Ashcroft*, 679 F.2d at 200, quoting *Moe*, 425 U.S. at 478. As we explained earlier, the language in *Moe* cannot be read to create such a broad rule. The Supreme Court's decision in *Brendale*, which approved a checkerboard pattern of zoning in the context of fee patented land, demonstrates conclusively that checkerboard jurisdiction is permissible under some circumstances in the context of fee patented land. See *Brendale*, 109 S. Ct. at 3008.

Any interpretation of *Ashcroft* suggesting that *Moe* held that the state cannot tax patented land because checkerboard jurisdiction is per se impermissible could not survive the Court's later *Brendale* decision nor would such an interpretation be consistent with *Confederated Bands*, a case we did not discuss in *Ashcroft*.

VII

[13] Finally, the Yakima Nation attempts to distinguish between the validity of the ad valorem taxes and the real property excise taxes imposed by Yakima County. Since the taxes are not taxes upon activities taking place upon the land, they are distinguishable from the taxes at issue in *McClanahan*, *Mescalero*, *Moe*, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980). However, further analysis of the real property excise tax is necessary.

The State of Washington's statutory scheme, which provides for satisfaction of real property excise sales taxes through ultimate recourse to the land, see Wash. Rev. Code chs. 82.45.070 and 82.46.040 (1962 and Supp. 1989), suggests that the excise tax at issue here qualifies as "taxation of said land" within the meaning of 25 U.S.C. § 349. Nevertheless, the Washington Supreme

Court has stated that "a tax upon the sales of property is not a tax upon the subject matter of that sale." *Mahler v. Tremper*, 40 Wash. 2d 405, 409, 243 P.2d 627, 629 (1952). Since we hold only that in section 6 of the General Allotment Act, Congress consented to permit the County to impose taxes against fee patented *land*, we cannot hold that section 6 permits the County to impose an excise tax that has specifically been held by the state supreme court *not* to be a tax upon the land. We therefore affirm the district court's summary judgment in favor of the Yakima Nation insofar as it relates to the excise taxes sought to be imposed by the County.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

 No. 88-3926

D.C. No. CV-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,*Plaintiff-Appellee,*

-vs-

COUNTY OF YAKIMA; and DALE A. GRAY,
Yakima County Treasurer,
Defendants-Appellants.

 Appeal from the United States District Court
for the Eastern District of Washington

 [Filed Jun. 7, 1990]

ORDER DENYING REHEARING

Before: WRIGHT, WALLACE, and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny appellant's and appellee's petitions for rehearing and to reject appellee's suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Case Number C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,
Plaintiff

v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

[Filed May 10, 1988]

JUDGMENT IN A CIVIL CASE

- ☐ Jury Verdict. This action before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff's motion for summary judgment is granted. The county of Yakima is prohibited from the levy, imposition or collection of ad valorem property taxes upon the fee patent land of the Yakima Nation, and its tribal members who have not severed tribal relations, within the exterior boundaries of the Yakima Indian Reservation.

May 10, 1988

/s/ James R. Larsen

Date

Clerk

(By) Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,*Plaintiff,*

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,*Defendants.*

[Filed May 10, 1988]

ORDER

Before the court for resolution is plaintiff's Motion for Summary Judgment (Ct. Rec. 11) and defendants' Cross-Motion for Summary Judgment (Ct. Rec. 19). The matter was heard by the court on April 8, 1988 at Yakima, Washington. Appearing on behalf of the plaintiff were R. Wayne Bjur, and Tim Weaver. The defendants were represented by John V. Staffan and Jeffery C. Sullivan. The court having considered the arguments of counsel, submissions of the parties, including the stipulated facts ordered by the court at the hearing on April 8, 1988, now renders the following decision.

By way of initial determination the court finds there is no genuine issue as to any material fact. Therefore, it is obliged to decide this case as a matter of law. F.R. Civ. P. 56.

This case centers on Yakima County's imposition of property tax on members of the Yakima Indian Nation. The Yakima Indian Reservation consists of approximately one million, three hundred thousand acres of land. The land is located almost entirely in Yakima County. There are approximately 7,604 enrolled members that comprise the Yakima Indian Nation. Almost 60% (4,500) of the Indian Nation's members reside within the exterior boundaries of the Nation. Furthermore, 104 individual members of the Yakima tribe own 139 parcels of fee patented land.

The United States Constitution, Article 1, section 8, Cl. 3, cloaks the Federal Government "with exclusive authority over relations with Indian tribes. See, *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1984). Generally, the Indian tribes, and their members, are exempt from state taxation within the exterior boundaries of their respective reservations. *Id.*; *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1972). However, Congress may grant authorization that allows states to impose taxes on Indian tribes and their members. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1972).

The Supreme Court has addressed the issue of state imposed taxes on Indian lands. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975) (Court invalidated cigarette sales tax on; reservation sales by tribal members to Indians living on the reservation, vendor license fee on tribal member operating shop on reservation, and personal property tax for registering motor vehicles; but state was allowed to pre-collect cigarette sales tax imposed by law on non-Indian purchaser); *Ramah Navaho School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982) (federal law preempted tax imposed on non-Indian construction company for gross receipts received from tribe for construction of school for Indian

children on reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980) ("the power to tax transaction occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law, or necessary implication of their dependent status.") However, the Supreme Court has not been presented with the issue of whether a county can impose ad valorem property tax on land that has been patented in fee to tribal members under the General Allotment Act.

The fee patented land is the crux of the dispute between the parties. Yakima County has collected ad valorem property tax from the Yakima Nation's members who have received fee patented land under the General Allotment Act of 1887. Section 6 of the General Allotment Act, as amended, 25 U.S.C. 349 provides in pertinent part:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside . . . PROVIDED, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and *thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . .*" (emphasis added)

In pertinent part, the General Allotment Act granted Indians,

"individual land allotments, with the United States holding title in trust for the allottees for twenty-five years, thereafter, the allottee or his heirs received the land in fee simple.

The main purpose of the twenty-five year trust period was "for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property. . ." Statement of Rep. Skinner, 18 Cong. Rec. 190 (1886) quoted in *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980); *Nichols v. Rysaay*, 809 F.2d 1317, 1321 (8th Cir. 1987).

At first glance, it would seem that "the literal language of the proviso [section 6] evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. *Squire v. Capoeman*, 351 U.S. 1, 8 (1955). However, the General Allotment Act, particularly section 6, is inconsistent with the subsequent Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*

Congressional policy under the General Allotment Act was essentially to abolish the reservation. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) cited in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1975). In comparison, the "intent and purpose of the [Indian Reorganization] Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934). The Indian Reorganization Act encouraged tribes, with the approval of the Department of Interior, to adopt constitutions, elect tribal leaders and, in part, run their own governments. 25 U.S.C. 461 *et seq.* Moreover, as Justice White stated, "Unquestionably, the [Indian Reorganization] Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1972). Similarly, the Supreme Court has repeatedly found that Congress repudiated the

policy of the General Allotment Act with the passage of the Indian Reorganization Act. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) cited in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1975).

The question presented to the court is a very narrow one. Although the Supreme Court has not decided the issue on point, this court is swayed by the Court's reasoning in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1975). In *Moe*, the State of Montana relied upon section 6 of the General Allotment Act, 25 U.S.C. 349, to tax Indians who had taken land in fee simple. *Id.* at 477. Mr. Chief Justice Rehnquist, then Justice Rehnquist, speaking for a unanimous Court, held that Montana's position was "untenable for several reasons." *Id.* at 478. Essentially, the Court was concerned that the checkerboard jurisdiction "would substantially diminish the size of the Flathead Reservation." *Id.* Therefore, the Court affirmed a prior holding and concluded that "[s]uch an impractical pattern of checkerboard jurisdiction, was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction." *Moe*, 425 U.S. at 478 citing, *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962).

The map entered as an exhibit by stipulation of the parties clearly demonstrates the checkerboard effect of the imposition of ad valorem property taxes upon fee patented land.

Yakima County contends that because Congress has not repealed the General Allotment Act, it is authorized to impose ad valorem property taxes on fee patent land issued to the tribe's members. However, the County's position is contrary to the Court's analysis in *Moe*. As Justice Rehnquist stated, "Congress by its more modern legislation has evinced a clear intent to eschew any such checkerboard approach within an existing reservation. . ." *Id.* at 479. Thus, this court's interpretation of *Moe* is that the Supreme Court has impliedly nullified section 6

of the General Allotment Act whenever it is applied within a reservation. Furthermore, this court's reading of *Moe* finds support in Felix S. Cohen's, *Handbook of Federal Indian Law*, 1982 ed., Ch. 6, p. 380 n.287.

In light of the aforementioned reasons, this court finds that Yakima County has no jurisdiction to impose ad valorem property tax upon fee patent land held by members of the Yakima Indian Nation. To rule otherwise, would allow for the checkerboard jurisdiction that Congress and the Supreme Court have discredited.

Accordingly, plaintiff's motion for summary judgment is GRANTED. The county of Yakima is prohibited from the levy, imposition or collection of ad valorem property taxes upon the fee patent land of the Yakima Nation, and its tribal members who have not severed tribal relations, within the exterior boundaries of the Yakima Indian Reservation.

IT IS SO ORDERED. The clerk is directed to enter this order and forward copies to counsel for the parties.

DATED this 6th day of May, 1988.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States District Judge

⑤
No. 90-408

Supreme Court, U.S.
F I L E D
DEC 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

**In The
Supreme Court of the United States
October Term, 1990**

**COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,**
Petitioners,
vs.

**CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,**
Respondent.

**Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit**

MEMORANDUM OF RESPONDENT

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QUESTIONS PRESENTED

(1) Has the effect of this Court's opinion in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), wherein this Court determined Section 6 of the General Allotment Act had been *repudiated* and that it no longer granted states jurisdiction over Indians on fee lands, been altered or diminished by this Court's subsequent opinions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes*, 109 S. Ct. 2997 (1989)?

(2) Can the State of Washington lawfully impose an excise tax upon the Yakima Indian Nation and/or its members for the sale or conveyance of fee land owned by the Yakima Indian Nation and/or its members within the Yakima Indian Reservation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE.....	2
RESPONSE TO PETITION FOR WRIT.....	3
A. Section 6 Of The General Allotment Act Is Not "Good Law" As Argued By Yakima County	3
B. This Court Has Previously Adopted A Per Se Rule In The Special Area Of State Taxation Of Indian Tribes And Tribal Members, Not A Bal- ancing Approach As Described In <i>Montana</i> And <i>Brendale</i>	5
C. The Ninth Circuit Decision As To The Excise Tax On Sales Of Real Estate Was Correct And Does Not Merit Certiorari	7
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brendale v. Confederated Tribes</i> , 109 S. Ct. 2997 (1989)	2, 3, 5, 6, 7
<i>California v. Cabazon Band of Indians</i> , 480 U.S. 202, 215 N.17 (1987).....	6, 7
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	3
<i>McClanahan v. State Tax Commission of Arizona</i> , 411 U.S. 164, 172 (1973)	7
<i>Moe v. Confederated Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976)	2, 3, 4, 5, 7, 8
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	5, 6, 7
<i>Warren Trading Post Co. v. Arizona Tax Commission</i> , 380 U.S. 685 (1965)	7
<i>Washington v. Colville Tribes</i> , 447 U.S. 134 (1980)	8
STATUTE	
25 U.S.C. 349	3

No. 90-408

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
vs.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Ninth Circuit

MEMORANDUM OF RESPONDENT

The respondent, Confederated Tribes and Bands of the Yakima Indian Nation, respectfully submits the following Memorandum of Respondent. The Petition of the County of Yakima, and the Cross-Petition of the Yakima Indian Nation previously filed in response to the County's Petition under Docket No. 90-577, set forth the opinions below, the basis of jurisdiction, and the statutes, treaties and constitutional provisions involved in these proceedings.

STATEMENT OF THE CASE

The Statement of the Case set forth in Yakima County's Petition and in the Yakima Indian Nation's Cross-Petition (Docket No. 90-577) provides a description of the essential facts of this case, and its progression through the District Court and Ninth Circuit Court of Appeals. This Memorandum of Respondent is submitted in addition to the Cross-Petition at the request of this Court.

This case was presented to the Ninth Circuit Court of Appeals prior to the handing down of this Court's opinion in *Brendale v. Confederated Tribes*, 109 S. Ct. 2997 (1989). Because *Brendale* involved a dispute between Yakima County and the Yakima Indian Nation as to which government had the jurisdiction and authority to zone *non-member owned* fee land within the Yakima Indian Reservation neither Yakima County nor the Yakima Nation believed *Brendale* impacted on the issue of whether the County could tax *member owned* fee lands within the reservation.

When the Ninth Circuit issued its opinion, in part adopting a *Brendale* balancing approach to weigh the property tax issue, a rare agreement resulted between the Yakima Nation and the Yakima County. Both the Tribe and the County agreed the Ninth Circuit opinion was erroneous. Both the Tribe and County petitioned for rehearing to the Ninth Circuit, arguing *Brendale* was not pertinent to the tax issue. Even though the Yakima Nation did not believe a *Brendale* analysis should be applied to this case, the greater concern of the tribe was with the Ninth Circuit's treatment of *Moe v. Confederated Salish and*

Kootenai Tribes, 425 U.S. 463 (1976) and 25 U.S.C. 349. The Yakima Nation believes this Court should first respond to the Ninth Circuit's analysis of *Moe*, and 25 U.S.C. 349. Once this occurs, this Court should not need to address the issue of whether the *Brendale* test applies to a tax issue.

RESPONSE TO PETITION FOR WRIT

The legal arguments set forth in this response are intended to supplement the Cross-Petition previously filed under Docket No. 90-577. This response will briefly address specific arguments of Yakima County set forth in its Petition for a Writ of Certiorari.

A. Section 6 Of The General Allotment Act Is Not "Good Law"¹ As Argued By Yakima County.

Yakima County argues that Section 6 of the General Allotment Act (25 U.S.C. 349) continues to be an *affirmative* grant from Congress to states permitting the taxation of Indian owned fee lands within Indian reservations, including Yakima. Yakima County relies on *Goudy v. Meath*, 203 U.S. 146 (1906) to support its position. Both Yakima County and the Ninth Circuit fail to properly understand the impact of the Indian Reorganization Act, and subsequent Congressional legislation, upon the Allotment Acts. Chief Justice Rehnquist (then Justice Rehnquist), speaking for a *unanimous* court, previously

¹ The Ninth Circuit characterized the General Allotment Act as still being viable legislation, using the words "good law" in its opinion 903 F.2d at 1216.

addressed and rejected this identical argument in the *Moe* case.

In *Moe*, the State of Montana argued that the General Allotment Act had never been explicitly "repealed", that Congress had never withdrawn the taxing jurisdiction otherwise provided in Section 6 of the Allotment Act (25 U.S.C. 349), and that such power had continued to the present. This Court rejected Montana's argument, finding it *untenable* for several reasons. *Moe* at 477 and 478.

One of the reasons this Court rejected Montana's argument was, if state jurisdiction to tax Indians existed on fee lands but not as to trust or restricted lands, then the Flathead Reservation had been substantially diminished in size. This Court stated such an impractical pattern of checker board jurisdiction was contrary to the intent embodied in the existing federal statutory law. *Moe* at 478. This is exactly the reason why Yakima County cannot lawfully impose property taxes on the Yakima Nation and its fee lands. Such property taxation effectively reduces the size of the Yakima Indian Reservation to the Yakima people², a result prohibited by *Moe* and existing federal law.

This Court also reasoned that, the policy of allotment and sale of surplus reservation land was *repudiated* in 1934 by the Indian Reorganization Act. That *no decisional authority* exists which supports the contention that Section 6 of the General Allotment Act continues to supply

² The record demonstrates that 20% of all fee lands owned by tribal members were scheduled for property tax sale in November, 1987.

taxing jurisdiction to states in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands. *Moe* at 479.

During oral argument in the case, the Judges of the Ninth Circuit Panel asked questions about what Chief Justice Rehnquist meant by the words "untenable" and "repudiated". These terms are clear to the Yakima Nation. The Ninth Circuit simply ignored or refused to accept the import and effect of the *Moe* opinion. This Court should inform the Ninth Circuit that legislation which is "repudiated" is legislation which is no longer "good law". The Yakima Nation believes that the Ninth Circuit should be reversed and the judgment of the District Court reinstated.³ The Yakima Nation contends that the *Moe* case so clearly resolves this issue in the favor of the Yakima Nation that this Court can summarily enter an order or reversal consistent with its Cross-Petition in accordance with Rule 16.1.

B. This Court Has Previously Adopted A Per Se Rule In The Special Area Of State Taxation Of Indian Tribes And Tribal Members, Not A Balancing Approach As Described In Montana And Brenden.

After the Ninth Circuit erroneously determined Section 6 of the General Allotment Act was "good law", the Ninth Circuit determined the case should be remanded to

³ Judge Alan McDonald in his District Court opinion found in the Appendix to Yakima County's Petition at 34a - 39a, relied heavily on the Rehnquist opinion in *Moe*. The Yakima Nation believes the District Court properly understood what was meant by the word "repudiated".

the District Court to apply a *Brendale* balancing test. The Yakima Nation believes that such an approach to the area of state taxation of Indian tribes and tribal members is contrary to the decisions of this Court.

Perhaps the clearest, most succinct summary of this Court's approach to this area of law is found in *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17 (1987). Here, this Court stated that it had adopted a *per se* rule, recognizing that the federal tradition of Indian immunity from state taxation is very strong and that the states' interest in taxation is correspondingly weak. This *per se* rule is not consistent with a *Brendale* approach whereby the validity of the tax depends on the seriousness of the impact on the tribe and its members.

The Yakima Nation fails to perceive how *Brendale* would apply. *Brendale* as well as *Montana v. United States*, 450 U.S. 544 (1981), involved disputes between state government and tribal government as to which government had regulatory jurisdiction over *non-members* on reservation fee lands. In both *Montana* and *Brendale*, this Court's opinions provided that the Indian Reorganization Act did not restore to tribes aspects of sovereignty lost by implication when non-members began to occupy fee lands acquired under the authority of the General Allotment Act. Recognizing the historical effect of the General Allotment act, is a far different concept from determining that the General Allotment Act continues as "good law".

This case is a dispute between Yakima County and the Yakima Nation over the taxation of the tribe and tribal members. There is no issue pertaining to the assertion of tribal jurisdiction over non-members in this case.

The Yakima Nation contends the *per se* rule described in *Cabazon* was not diminished or altered by *Brendale* and should continue to apply.

C. The Ninth Circuit Decision As To The Excise Tax On Sales Of Real Estate Was Correct And Does Not Merit Certiorari.

Regarding the other tax the Yakima Nation challenged in this case, the Yakima Nation OPPOSES the granting of a Writ of Certiorari. In the District Court, the Yakima Nation successfully challenged the jurisdiction of Yakima County to collect an excise tax otherwise imposed upon the Yakima Nation and/or its members when reservation fee lands owned by the Yakima Nation and/or its members are sold. The Ninth Circuit affirmed the District Court's decision on the excise tax issue. This issue does not present a question which merits review.

Efforts by states to impose excise taxes on Indian tribes and Indian people within recognized reservations have consistently been struck down by the federal courts for a number of years. State taxes upon Indian people and their property are generally considered an infringement upon the right of the Indian people to maintain their self-government. States taxes are considered preempted by the federal trust relationship between the United States and Indian tribes. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973). The federal preemption analysis supported this Court's invalidation of a gross receipts tax, *Warren Trading Post, Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); a state income tax, *McClanahan*; personal property tax, *Moe*; an excise tax on

motor vehicles, *Washington v. Colville Tribes*, 447 U.S. 134 (1980); and cigarette excise taxes, *Moe and Colville*. The state excise tax struck down by the District Court and the Ninth Circuit is not distinguishable from the state taxes invalidated in the above-mentioned cases. This issue clearly does not warrant review by this Court on a Writ of Certiorari as the lower court decisions are consistent with this Court's decisions and do not conflict with a decision of a state court of last resort or with a decision of another Court of Appeals.

CONCLUSION

On the basis of the facts and the *Moe* case, the Yakima Nation requests that its Cross-Petition for a Writ of Certiorari be granted and the Court enter an order pursuant to Rule 16.1 summarily reversing the Ninth Circuit, reinstating the well-reasoned opinion of the District Court.

DATED this 7th day of December, 1990.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

ON PETITION AND CROSS-PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

2. Whether Yakima County may impose its excise tax on sales of real property on the Reservation by the Yakima Nation or its members.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	19

TABLE OF AUTHORITIES

Cases:

<i>Bates v. Clark</i> , 95 U.S. 204 (1877)	14
<i>Battese v. Apache County</i> , 129 Ariz. 295, 630 P.2d 1027 (1981)	7
<i>Brendale v. Confederated Tribes & Bands of Yakima Nation</i> , 109 S. Ct. 2994 (1989)	2, 6, 8
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	9, 17
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	9, 16
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989)	9, 17
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	16
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	14
<i>Estate of Johnson</i> , 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. Ct. App.), cert. denied, 459 U.S. 828 (1981)	7
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	5, 10, 11, 13
<i>Heff, In re</i> , 197 U.S. 488 (1905)	10
<i>Kennerly v. District Court of Montana</i> , 400 U.S. 423 (1971)	16
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	14, 15
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	9, 10, 13, 16
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	13
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	9, 13
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	2, 3, 4, 11, 13, 15
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985) ..	4, 9
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	16

IV

Cases—Continued:

Page

<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	9
<i>Ramah Navajo School Bd. v. Bureau of Revenue</i> , 458 U.S. 832 (1982)	9, 17-18
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	14, 15
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	13, 16, 17
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	14
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	12
<i>United States v. Morrow</i> , 266 U.S. 531 (1925)	11
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	11, 12
<i>Washington v. Confederated Bands & Tribes of Yakima Nation</i> , 439 U.S. 463 (1979)	2
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	9
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	9, 13
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	16

Treaty and statutes:

Treaty of June 9, 1855, 12 Stat. 951 <i>et seq.</i>	1-2
Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390	3
Act of May 8, 1906, ch. 2348, 34 Stat. 182	3
Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 <i>et seq.</i>	3
General Allotment Act, 25 U.S.C. 331 <i>et seq.</i> :	
§ 5, 25 U.S.C. 348	12
§ 6, 25 U.S.C. 349	<i>passim</i>
Indian Reorganization Act of 1934, 25 U.S.C. 461 <i>et seq.</i> :	
§ 1, 25 U.S.C. 461	15
§ 2, 25 U.S.C. 462	15
§ 3, 25 U.S.C. 463	15
Trade and Intercourse Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729	13
18 U.S.C. 1151	5, 7, 16, 17
18 U.S.C. 1151 (a)	15, 16
18 U.S.C. 1151 (c)	14

V

Miscellaneous:

Page

40 Cong. Rec. 3598-3602 (1906)	10
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942)	15
Idaho Tax Comm's, <i>Taxation of Lands Within Indian Reservations Which Are Owned by Individual Indians</i> (June 8, 1982)	7
N.D. Op. Att'y Gen. No. 85-12 (1985)	7
Oregon Dep't of Justice, <i>Taxation of Indian Fee Land</i> (Ltr. Mar. 14, 1983)	7
S. Rep. No. 1998, 59th Cong., 1st Sess. (1906)	10

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-408

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION

No. 90-577

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

*ON PETITION AND CROSS-PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Respondent Confederated Tribes and Bands of the Yakima Nation (Yakima Nation) occupies a Reservation comprising 1,387,505 acres in the State of Washington. The Reservation was established pursuant to an 1855

Treaty, which was ratified in 1859. 12 Stat. 951. Approximately 80% of the Reservation land is held in trust by the United States for members of the Yakima Nation or the Nation itself. The remainder is owned in fee by the Yakima Nation, individual members of the Nation, or nonmembers. *Brendale v. Confederated Tribes & Bands of Yakima Nations*, 109 S. Ct. 2994, 3000 (1989) (opinion of White, J.); *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 469 (1979).¹

2. This suit was commenced in 1987 by the Yakima Nation against Yakima County and its treasurer. The Yakima Nation sought an injunction to prevent the County from imposing its ad valorem property tax on lands owned in fee by the Nation or its members within the boundaries of the Reservation and from collecting the state excise tax on sales of such lands by the Nation or its members.²

The district court granted summary judgment for the Yakima Nation. Pet. App. 34a-39a. The court relied in particular on *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), where this Court held that Montana could not impose a personal property tax on property of tribal members located within a reservation, assess a vendor license fee on an Indian conducting a business on reservation land, or tax on-reservation purchases of cigarettes by tribal members. Pet. App. 35a, 37a-39a; see 425 U.S. at 475-481.

The Court in *Moe* rejected as "untenable" Montana's argument that the taxes and license fee there at issue were authorized by Section 6 of the General Allotment Act, as revised in 1906, which provides, *inter alia*, that

¹ The district court found that 104 members of the Yakima Nation own 139 parcels of fee patented land. Pet. App. 35a.

² The suit was prompted by the County's commencement of tax foreclosure proceedings against several on-Reservation parcels owned in fee by the Yakima Nation or individual members for which taxes were past due for three years. See Pet. 4-5.

Indian allottees "shall have the benefit of and be subject to" the civil and criminal laws of the State at the expiration of the trust period. 25 U.S.C. 349.³ The Court explained that "[i]f the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size"; that result, the Court explained, would create an "impractical pattern of checkerboard jurisdiction" and conflict with "existing federal statutory law of Indian jurisdiction." 425 U.S. at 478. The Court also concluded in *Moe* that Montana's reliance on Section 6 of the General Allotment Act overlooked the Court's more recent conclusions about that Act's "present effect"—specifically, that although the General Allotment Act was passed for the ultimate purpose of allotting lands to all individual Indians and abolishing reservations, that policy "was repudiated in 1934 by the Indian Reorganization Act [IRA]." 425 U.S. at 479. The Court observed that there was no decisional authority giving the meaning Montana urged to Section 6 of

³ Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182. Section 6, as amended and codified at 25 U.S.C. 349, states in relevant part:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent * * *.

⁴ Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*

the General Allotment Act “in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands,” and it therefore declined to validate Montana’s taxes on the basis of Section 6. 425 U.S. at 479.

In this case, Yakima County relied on a proviso to Section 6 of the General Allotment Act, which provides that if an allottee is competent and able to manage his affairs, the Secretary of the Interior may, prior to expiration of the statutory trust period, issue the allottee a patent in fee, and “thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” This proviso was not quoted in *Moe*. But applying the reasoning of *Moe* to this case, the district court noted that application of Yakima County’s ad valorem tax on fee patented lands owned by Yakima Nation members on the Reservation would have a comparable “checkerboard effect,” and it concluded that, as in *Moe*, “Congress by its more modern legislation has evinced a clear intent to eschew any such checkerboard approach within an existing reservation”. Pet. App. 38a (quoting 425 U.S. at 479). The Court therefore held that the proviso to Section 6, like the principal clause quoted in *Moe*, did not grant Yakima County jurisdiction to tax fee patented lands owned by the Yakima Nation or its members. Pet. App. 38a-39a.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-30a.

a. The court of appeals acknowledged that Indians on their reservations are exempt from state taxation unless Congress directs otherwise with “unmistakabl[e]” clarity. Pet. App. 12a (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). But it believed that the proviso to Section 6 of the General Allotment Act satisfied that standard. The court acknowledged that *Moe* furnished the “strongest support” for not reading the proviso to authorize such taxation in the face of more modern legislation, Pet. App. 15a, especially since *Moe* declined to

follow *Goudy v. Meath*, 203 U.S. 146 (1906), which had relied on the prior version of Section 6 to sustain state taxing jurisdiction over an Indian allottee. But the court below chose to confine *Moe* to the principal clause of Section 6, quoted in the Court’s opinion in that case, and not to apply *Moe*’s rationale to the proviso. Pet. App. 15a-17a.

The court of appeals emphasized that *Moe* involved state taxation of activities unrelated to land, while the proviso to Section 6 addresses taxation of the land itself. Pet. App. 17a-18a, 26a. Accordingly, although the court acknowledged *Moe*’s holding that the policies of the General Allotment Act were repudiated by the IRA and that Section 6 therefore does not permit state taxation of Indian activities on Indian-owned fee lands on a reservation, it held that because the proviso to Section 6 was not expressly repealed by the IRA, it permits state taxation of the lands themselves. Pet. App. 18a-20a. Similarly, the court was unpersuaded that 18 U.S.C. 1151—which was enacted in 1948 to codify a modern definition of “Indian country” that includes all land within the boundaries of an Indian reservation, “notwithstanding the issuance of any patent”—bars imposition of the County’s ad valorem tax. The court believed that 18 U.S.C. 1151 defines “Indian country” only for purposes of criminal jurisdiction and therefore is “not * * * relevant to the question of whether fee patented land may be taxed by the state.” Pet. App. 20a-21a; see also *id.* at 24a-25a, 26a.

Although the court of appeals rejected the Tribe’s argument that application of the County’s ad valorem tax to Indian-owned fee lands on the Reservation is absolutely forbidden by *Moe* and the congressional policy eschewing checkerboard jurisdiction, Pet. App. 23a-27a, it did not actually sustain the tax as applied to such lands. The court noted that after the district court rendered its decision, this Court held in *Brendale* that a Tribe may regulate activities on fee lands owned by non-Indians if

the impact of those activities is "demonstrably serious" and "imperil[s] the political integrity, economic security or the health and welfare of the tribe." *Id.* at 27a (quoting 109 S. Ct. at 3008 (opinion of White, J.)). Although this case is the converse of *Brendale*—inasmuch as it involves an assertion of state jurisdiction over fee lands owned by Indians—the court of appeals believed *Brendale* to be relevant, because the Yakima Nation had "presented evidence of how the checkerboard jurisdiction that would result from Yakima County's taxation would affect it in a demonstrably serious way. Pet. App. 27a-28a. The court therefore remanded the case to the district court with directions to consider that evidence under the standard it drew from the intervening decision in *Brendale*. *Id.* at 28a.⁵

b. By contrast, the court of appeals found no reason for further proceedings concerning the excise tax, which it held may not be applied to sales of on-reservation fee lands by the Yakima Nation or its members. The court explained that in its view Section 6 of the General Allotment Act authorizes state taxation only of the land itself, while state law imposes the excise tax on the sale of the land. Pet. App. 29a-30a.

DISCUSSION

The court of appeals' conclusion that Section 6 of the General Allotment Act might permit Yakima County to impose its ad valorem tax on Indian-owned fee lands on the Yakima Reservation is inconsistent with *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). There, the Court held that a State is barred from taxing

⁵ The Yakima Nation filed a petition for rehearing with suggestion of rehearing en banc of the panel's holding that the rationale of *Moe* does not foreclose imposition of the ad valorem tax on Indian-owned fee lands within the Reservation. The United States filed an amicus brief in support of the Yakima Nation at the rehearing stage, taking the same position we present herein. The court of appeals denied rehearing.

personal property owned by Indians or activities engaged in by Indians on a reservation, including on lands owned in fee. It would be anomalous indeed if a State were permitted to tax the reservation land itself (when it is owned by Indians), since land is at the very core of an Indian reservation's existence. Accordingly, courts or agencies in a number of states have concluded that state taxes may not be imposed on Indian-owned fee lands on a reservation. *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981); N.D. Op. Att'y Gen. No. 85-12 (1985); Oregon Dep't of Justice, *Taxation of Indian Fee Land* (advice letter dated Mar. 14, 1983); Idaho Tax Comm'n, *Taxation of Lands Within Indian Reservations Which Are Owned by Individual Indians* (June 8, 1982); see also *Estate of Johnson*, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. Ct. App. 1981) (inheritance taxes), cert. denied, 459 U.S. 828 (1982).

The Ninth Circuit did not definitively hold to the contrary in this case. In fact, it held that the excise tax could *not* be applied to sales of Indian-owned fee land on the Reservation. And although the Ninth Circuit rejected the Yakima Nation's contention that application of the ad valorem tax to Indian-owned fee lands is foreclosed by *Moe* and by more modern legislation (such as the Indian Reorganization Act and 18 U.S.C. 1151), it did not actually sustain the ad valorem tax as applied to such lands. The court instead directed the district court to consider whether the ad valorem tax is barred (notwithstanding the proviso to Section 6 of the General Allotment Act) because, as alleged by the Yakima Nation, the tax would have a seriously adverse impact. Pet. App. 27a-28a. If the courts below so hold, the result reached in this case (even if not the reasoning employed) would be consistent with *Moe* and with the result reached by courts and agencies in the other States mentioned above.

Notwithstanding this possible outcome on remand, we believe, on balance, that the Court should grant review

now. As Yakima County points out (Pet. 10), suits similar to this one have been brought by the United States or the Tribe concerned with respect to fee lands on reservations in Montana and South Dakota, and a similar administrative case is pending in Colorado. The same issue will no doubt arise on other reservations and in other States as well. Furthermore, the legal issues presented by the parties are ripe for review and would not be illuminated by the proceedings on remand. Yakima County contends in its certiorari petition that imposition of the ad valorem tax is *authorized* as a matter of law under Section 6 of the General Allotment Act, without any need for the sort of particularized assessment of the impact of the tax that the court of appeals ordered under a test derived from *Brendale v. Confederated Tribes & Bands of Yakima Nation*, 109 S. Ct. 2994 (1989). Conversely, the Yakima Nation contends in its cross-petition (and we agree) that imposition of the ad valorem tax to Indian-owned land is *prohibited* as a matter of law under *Moe* and the more modern statutory provisions governing jurisdiction over Indian reservations, without any need for such a particularized assessment. Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be dispositive of this and other pending and future cases, and therefore would obviate the need for potentially protracted and complex litigation regarding the impact of real estate taxes on a case-by-case basis under the *Brendale*-type test fashioned by the Ninth Circuit.

For the foregoing reasons, we urge the Court to grant review now to consider the effect of *Moe* and Section 6 of the General Allotment Act in this setting, and thereby to resolve a question of recurring importance on Indian reservations.

1. a. In most situations involving the application of state law to on-reservation matters affecting Indians, the Court has engaged in a particularized inquiry into the respective federal, tribal, and state interests at stake.

"The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-177 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838-839 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-145 (1980).

However, "[i]n the special area of state taxation of Indian tribes and tribal members," the Court has "adopted a *per se* rule" barring such taxation. *Cabazon*, 480 U.S. at 215 n.17; see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Although Congress may authorize imposition of state taxes on Indian tribes and individual Indians, "it has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Ibid.* (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). The Court has applied this principle in holding that States may not tax income earned by Indians on their reservation, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), Indian-owned personal property situated on the reservation, *Moe*; *Washington v. Confederated Tribes of Colville Indian Reservation (Colville)*, 447 U.S. 134 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976), or on-reservation sales and purchases by tribal members, *Moe*; *Colville*. Finally, the relevant statutory framework "must be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766.

b. Under the principles just discussed, it follows *a fortiori* that, in the absence of an Act of Congress ex-

pressly so providing, Yakima County may not tax real property owned in fee by the Yakima Nation or its members within the Yakima Reservation. See *McClanahan*, 411 U.S. at 181 ("the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself"). Yakima County does not appear to contend otherwise. But the County does contend (Pet. 6-7) that application of the ad valorem tax here is sufficiently authorized by Section 6 of the General Allotment Act, as amended in 1906, and by this Court's decision in *Goudy v. Meath*, 203 U.S. 146 (1906), which construed certain language in the original version of Section 6. This argument, we believe, is foreclosed by *Moe*.

In *Moe*, Montana argued that Section 6 of the General Allotment Act authorized it to tax transactions occurring on, and Indian-owned personal property situated on, fee lands within the Flathead Reservation. Montana relied on the portion of Section 6, as revised in 1906, stating that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Montana pointed out that in *Goudy v. Meath*, the Court had rejected the claim of an Indian patentee that State taxing jurisdiction was not among the "laws" to which he and his land had been made subject.⁶ "Building on

⁶ *Goudy v. Meath* arose under the original version of Section 6, which had been construed to confer citizenship on allottees, and to subject them to the full reach of state law, when they first received an allotment and trust patent, rather than at the expiration of the trust period. See *In re Heff*, 197 U.S. 488 (1905). In response to *In re Heff*, Section 6 was amended in 1906 to provide that allottees would not be subject to state law until the expiration of the trust period. See S. Rep. No. 1998, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 3598-3602 (1906). The proviso to Section 6, on which the County relies in this case, was also enacted in 1906.

In re Heff further held that federal laws prohibiting the sale of liquor to Indians were rendered inapplicable when allottees became citizens and were subject to state laws, and indicated that Congress could not regulate sales of liquor to Indians after that time. This

Goudy and the fact that the General Allotment Act has never been explicitly 'repealed,' Montana argued in *Moe* "that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present." 425 U.S. at 477. The Court found this interpretation of Section 6 "untenable," in light of the IRA's repudiation of the allotment policy and "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands." *Id.* at 478-479. Thus, the Court in *Moe* squarely rejected the contention that Section 6 of the General Allotment Act and the holding in *Goudy v. Meath* permit state taxation of matters occurring on fee lands.

Yakima County seeks to avoid the holding in *Moe*—and to tax the (Indian-owned) fee land itself—by relying on the first proviso to Section 6, which was not quoted in *Moe*. Although the principal clause of Section 6, quoted in *Moe*, states that an allottee shall be subject to state law after expiration of the statutory trust period, the proviso allows the Secretary to issue a fee patent prior to that time if he finds that the allottee is competent and capable of managing his own affairs; the proviso then states that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The County argues (Pet. 6-7) that this portion of the proviso authorizes it to tax Indian-owned fee lands on the Reservation. While it is true that the proviso to Section 6 was not specifically discussed in *Moe*, we believe that the Court's rationale in that case encompasses all of Section 6.

In the first place, if the principal clause of Section 6 is insufficient to authorize state taxation of Indian property and transactions within a reservation's boundaries (as the Court held in *Moe*), it is reasonable to assume that a mere proviso to the principal clause likewise is insufficient to permit state taxation. Cf. *United States v. Morrow*, 266 U.S. 531, 534-535 (1925) (a proviso is pre-

aspect of *In re Heff* was overruled in *United States v. Nice*, 241 U.S. 591 (1916).

sumed to be confined to the subject matter of the principal clause). That construction of Section 6 as a whole is reinforced by the purpose to be served by the proviso: it simply had the effect of accelerating the date on which the land passed out of trust status, if the allottee was found to be prepared to receive such a patent prior to the date (referred to in the principal clause of Section 6) on which the trust period otherwise would expire. Nothing in Section 6 suggests that such land should be treated differently for purposes of the general principles that govern the application of state tax laws under the current statutory framework allocating jurisdiction over Indian reservations.

Significantly, moreover, it is only the principal clause of Section 6, which was construed in *Goudy v. Meath* and quoted in *Moe*, that affirmatively provides that the allottee "shall * * * be subject to" state law when the land passes out of trust status. By contrast, the proviso states only that all "restrictions" on sale, incumbrance and taxation shall be removed. The restrictions referred to obviously are those that were imposed by the General Allotment Act itself, which, by specifying in Section 5 that an allotment was to be held in "trust," 25 U.S.C. 348, protected the individual allottee by protecting his or her property from alienation and taxation. See *United States v. Mitchell*, 445 U.S. 535, 543-544 (1980). The lifting of those restrictions imposed by the General Allotment Act itself does not lift *other* barriers to the application of state tax laws; in particular, it does not override the general principles of preemption, confirmed by more modern legislation, that bar the extension of state laws (especially state tax laws) to Indians and their property within the boundaries of an existing reservation—principles that protect not only the individual Indian, but also the sovereignty and economic independence of his or her Tribe. See *United States v. Nice*, 241 U.S. 591, 599-600 (1916).

Put another way, the lifting of the General Allotment Act's "restrictions" on taxation permits taxes to be im-

posed by any governmental entity that otherwise may impose its tax on such lands. For example, if the land is situated outside a reservation, the State or its political subdivisions may tax the land once it is no longer in trust status, even if it is owned by an Indian. But if the land is situated inside a reservation and is owned by an Indian, it is not subject to the State's taxing laws; instead, the lifting of restrictions has the effect of permitting the Tribe, as the presiding sovereign, to levy a tax. Cf. *Merriam v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).⁷

Yakima County's narrow focus on the fact that certain fee lands on the Yakima Reservation were once allotted to individual Indians, and then passed into fee status pursuant to the proviso to Section 6 of the General Allotment Act, ignores the fact that those lands remain within the boundaries of an existing Reservation. The County's submission therefore ignores the "significant geographic component" of tribal sovereignty that undergirds preemption analysis in this area. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151; compare *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 170-171, with *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-150. The Court invoked these principles in *Moe* in holding that the principal clause of Section 6 and *Goudy v. Meath*'s interpretation of certain of its language do not authorize the imposition of state taxes on Indians and their property within a reservation. 425 U.S. at 475-477. It follows that the proviso to Section 6 and *Goudy v. Meath* (which did not even construe the proviso) likewise do not authorize such an application of state tax laws.

c. This conclusion is reinforced by the evolution of legislation governing Indians and Indian lands. At the time the General Allotment Act was passed, and up to 1948, the term "Indian country" was not defined by statute.⁸

⁷ Of course, the allotment also would be subject to applicable federal taxes when the trust period expired. *Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956).

⁸ "Indian country" had last been defined in Section 1 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729. That

During that period, "Indian country" typically was thought to include only land owned by Indians, often with the title held in trust by the United States; as a result, when Indian ownership ended, the land was no longer part of Indian country. *Bates v. Clark*, 95 U.S. 204, 208-209 (1877); *United States v. Celestine*, 215 U.S. 278, 285 (1909); *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).⁹

The General Allotment Act and related statutes enacted around the turn of the Century caused the land on many reservations to be allotted. The overall statutory design was that the allotted lands would be held in trust for individual Indians for a number of years, after which fee patents would be issued to the allottees, and excess lands not needed for allotment would be made available to the public under the homestead laws or similar programs. Congress envisioned that at least by the time the allotments were converted to fee status, the reservations would be abolished. *Mattz v. Arnett*, 412 U.S. 481, 496-497 (1973); *Solem v. Bartlett*, 465 U.S. at 466. Because the ultimate object of the relevant Acts of Congress was to sever the Indians' tribal relations and abolish their reservations, it is not surprising that Congress provided that when fee patents were issued, the allottees would be subject to the laws of the State (including tax laws), in the same manner as non-Indians. In other words, it was anticipated that the allottees' land would, at that time, cease to be Indian country. See 18 U.S.C. 1151(c) ("Indian country" includes "all Indian allotments, the Indian titles to which have not been extinguished").

provision, however, was not included in the Revised Statutes and was therefore repealed. *Donnelly v. United States*, 228 U.S. 243, 268 (1913).

⁹ One exception to this principle was that where Congress had set aside a tract of the public domain as an Indian reservation, that tract was automatically Indian country, even if the Indians had never previously occupied the land and had no ownership interest in it. *Donnelly*, 228 U.S. at 268-269.

Much land within Indian reservations passed out of trust status pursuant to the allotment Acts, and much came to be owned by non-Indians. See F. Cohen, *Handbook of Federal Indian Law* 216 (1942). In 1934, Congress passed the IRA, which "repudiated" the policies of the General Allotment Act. *Moe*, 425 U.S. at 479 (quoting *Mattz*, 412 U.S. at 496). In particular, Section 1 of the IRA prohibited further allotments, Section 2 extended indefinitely the trust period of existing allotments, and Section 3 provided for restoration of lands within the boundaries of reservations to tribal ownership. 25 U.S.C. 461, 462 and 463. Consistent with the IRA and the modern statutory policy of maintaining the existence of reservations, set apart from state jurisdiction (with respect to matters affecting Indians), Congress in 1948 enacted a statutory definition of Indian country, which includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. 1151(a) (emphasis added). As the Court explained in *Solem v. Bartlett*, 465 U.S. at 468:

The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. * * * Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See the Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151 (1982 ed.)).

Thus, 18 U.S.C. 1151(a) now codifies the preemptive principle embodied in the "many and complex intervening jurisdictional statutes," enacted since the 1906 revision of Section 6 of the General Allotment Act, that are "directed at the reach of state law within reservation lands." *Moe*, 425 U.S. at 479.¹⁰

¹⁰ The court of appeals held that the change in policy manifested by the IRA did not repeal Section 6 of the General Allotment Act. Pet. App. 20a. The court missed the point. There is no suggestion

The court of appeals believed that the definition of Indian country in 18 U.S.C. 1151 applies only to criminal, not civil matters, and that it therefore is not "relevant" to the question whether Indian-owned fee lands may be taxed by the State. Pet. App. 20a-21a, 24a-25a, 26a. The court was mistaken. This Court made clear in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), that "[w]hile Section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *Id.* at 427 n.2 (citing *McClanahan*, 411 U.S. at 177-178 n.17; *Kennerly v. District Court of Montana*, 400 U.S. 423, 424 n.1 (1971); and *Williams v. Lee*, 358 U.S. 217, 220-222 nn.5, 6 & 10 (1959)). See also *Cabazon*, 480 U.S. at 207 n.5; *Montana v. United States*, 450 U.S. 544, 562 (1981).

d. The court of appeals placed considerable reliance on *Squire v. Capoeman*, 351 U.S. 1 (1956), which held that the federal capital gains tax does not apply to the proceeds of timber cutting on trust allotments. Pet. App. 14a-17a. The Court in *Capoeman* rejected the government's submission that the 1906 amendment to the General Allotment Act was intended only to permit state and local taxation of allotments once a fee patent issued, and that federal taxation was permitted prior to that time. 351 U.S. at 7-8. That passage in *Capoeman*—concluding that the government's premise concerning the 1906 amendment should apply to federal as well as state and local taxation—has little to do with this case. The timber cutting and taxation at issue in *Capoeman* occurred in 1943, before the modern definition of Indian country was

here that Section 6 has been repealed, in whole or in part. Accordingly, if an allotment *outside* a reservation is removed from trust or restricted status, it becomes subject to the full reach of state law, including state tax laws. For allotments and other lands *inside* a reservation, however, the change in the statutory definition of "Indian country" in 18 U.S.C. 1151(a)—and the various Acts of Congress and judicial decisions that culminated in enactment of that definition—changed the effect that Section 6 (including its proviso) otherwise would have.

codified in 18 U.S.C. 1151 and at a time when there was greater uncertainty about the taxability of non-trust property held by Indians within the boundaries of their reservations.¹¹ Moreover, *Capoeman* involved federal, not state, taxation. Although, as *McClanahan* held, States generally may not tax Indians in Indian country, all citizens of the United States are required to pay federal income tax. *Capoeman*, 351 U.S. at 6.

2. Although the court of appeals at first appeared to regard the proviso to Section 6 of the General Allotment Act as sufficient in itself to authorize imposition of the ad valorem tax on fee lands owned by the Yakima Nation or its members, the court did not, in the end, conclude that the proviso necessarily validates that tax, as the County urged below and urges again here. Instead, the court of appeals remanded for the district court to determine whether the ad valorem tax is preempted, under a test drawn from Justice White's opinion in *Brendale*, because it would affect the Yakima Nation in a "demonstrably serious" way. Pet. App. 27a-28a.

The County challenges (Pet. 7-12) the court of appeals' invocation of *Brendale* in this setting. *Brendale* presented a question concerning the assertion of jurisdiction by the *Yakima Nation* over fee lands owned by *nonmembers* of the Yakima Nation. This case presents the converse situation: an assertion of jurisdiction by the *State* (through its political subdivision, Yakima County) over fee lands owned by *members* of the Yakima Nation and by the Nation itself. As a general matter, the question whether the exercise of state jurisdiction over reservation affairs involving Indians is preempted by federal law requires a particularized inquiry into the federal, tribal and state interests at stake. See, e.g., *Cotton Petroleum*, 490 U.S. at 176-177; *Ramah Navajo*,

¹¹ See *Bryan v. Itasca County*, 426 U.S. at 391 (referring to "a general uncertainty in 1953 of the precise limits of state power to tax reservation Indians respecting other than their trust property"); see also 426 U.S. at 392 n.16.

458 U.S. at 838-839. That test, unlike the one fashioned by the court below based on *Brendale*, does not require a showing that the application of state law would adversely affect the Tribe or its members in a "demonstrably serious" way. Moreover, as explained above (see page 9, *supra*), in the special area of the application of state tax laws to Indians and Indian land, the Court has applied a *per se* rule barring such taxation in the absence of express congressional authorization.

For the foregoing reasons, although in our view the court of appeals was properly reluctant to sustain the ad valorem tax as applied to Indian-owned Reservation lands on the basis of the proviso to Section 6 of the General Allotment Act (in light of the adverse impact the tax would have on the Yakima Nation and its members), the court of appeals should not have invoked the *Brendale* formulation to test the validity of the tax. Instead, the court should have applied established principles governing the application of state law to on-reservation matters affecting Indians. Accordingly, once the court concluded that Section 6 of the General Allotment Act was insufficient to authorize application of the ad valorem tax irrespective of its impact on the Yakima Nation and individual Indians, it should have invalidated the tax under the *per se* rule applied in *Moe* itself. That is the position urged by the Yakima Nation in its cross-petition. Thus, both the County and the Yakima Nation, as well as the United States as amicus curiae, take the position that the court of appeals erred in applying a *Brendale*-type test in this setting.

Once the *Brendale* test is put to one side, the options presented by the parties are clear-cut: either the ad valorem tax is authorized as a matter of law by the proviso to Section 6 of the General Allotment Act, as Yakima County urges, or the tax is prohibited as a matter of law under the rationale of *Moe*, as the Yakima Nation argues (and as we agree). In our view, that pure question of law is ripe for resolution, and the Court

should grant review here for that purpose, in light of the recurring nature of the problem.¹²

CONCLUSION

The petition and cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1991

¹² Petitioners also seek review of the court of appeals' holding that the state excise tax may not be imposed on sales of fee land by the Yakima Nation or its members. See Pet. 12-14; Pet. App. 29a-30a. That holding rests on a straightforward application of settled principles regarding state taxation of Indians and their property on a reservation, and the court of appeals' conclusion that the proviso to Section 6 of the General Allotment Act does not allow such taxation does not conflict with decisions of other courts and does not otherwise appear to present a question warranting review by this Court. Accordingly, the Court may wish to limit its grant of certiorari to question 1 presented in the petition and the question presented in the cross-petition (which concern the ad valorem tax). But in order to permit a more comprehensive consideration of issues concerning state taxation of Indian-owned fee lands and matters affecting such lands, we suggest that the grant not be limited.

JUN 14 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
v. *Petitioners,*

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
v. *Petitioner,*

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

	Page
Chronology of Relevant Docket Entries	1
Complaint (filed November 9, 1987)	2
Affidavit of Harvey Adams (filed November 12, 1987) ..	8
Affidavit of Vera Hernandez (filed November 12, 1987)	11
Agreed Order Temporarily Restraining Foreclosure Sale (filed November 20, 1987)	14
Motion for Summary Judgment (filed March 14, 1988) ..	17
Affidavit of Ray Olney (filed March 14, 1988)	18
Affidavit of R. Wayne Bjur (filed April 4, 1988)	22
Cross-Motion for Partial Summary Judgment (filed April 4, 1988)	25
Affidavit of Nancy Davidson (April 4, 1988)	27
Affidavit of Ralph Huck (filed April 4, 1988)	29
Answer (filed April 6, 1988)	31
Stipulation of Facts (filed April 26, 1988)	36
Order Granting Certiorari and for Consolidation (entered April 29, 1991)	45

CHRONOLOGY OF RELEVANT DOCKET ENTRIES

Filing date	Description of Entry
DISTRICT COURT	
November 9, 1987	Complaint
November 20, 1987	Agreed Order Temporarily Restraining Foreclosure Sale
March 14, 1988	Motion for Summary Judgment
April 4, 1988	Cross-Motion for Partial Summary Judgment
April 6, 1988	Answer
May 10, 1988	Order and Judgment (Cert. Pet. pp. 32a-39a)
COURT OF APPEALS	
January 9, 1990	Opinion and Judgment (not reproduced —see superseding Amended Opinion at Cert. Pet. pp. 1a-31a)
January 25, 1990	Appellee's Petition for Rehearing (not reproduced)
February 21, 1990	Appellant's Petition for Rehearing (not reproduced)
February 22, 1990	Motion of U.S. to Intervene (not reproduced)
May 16, 1990	Amended Opinion & Judgment (Cert. Pet. pp. 1a-31a)
June 7, 1990	Order Denying Rehearing (not reproduced)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR INJUNCTIVE RELIEF

[Filed Nov. 9, 1987]

COMES NOW the plaintiff and for cause of action
against the defendants, alleges as follows:

PARTIES

I.

Plaintiff is a federally recognized Indian Nation pursuant to the *Treaty with the Yakimas*, 12 Stat. 951. Plaintiff brings this action on its behalf as a sovereign, tribal entity and on behalf of its members who reside within the exterior boundaries of the Yakima Indian Reservation. Plaintiff also brings this action in the place of the United States of America who through the Department of Interior/Bureau of Indian Affairs, regulates and protects the interests of plaintiff and its enrolled members.

II.

Defendant, County of Yakima, is a municipal corporation of the state of Washington. A substantial portion of plaintiff's reservation is located within Yakima County.

III.

Defendant Dale A. Gray is the duly elected treasurer of Yakima County, Washington, responsible for the collection of ad valorem property taxes within Yakima County, Washington.

JURISDICTION

IV.

This Court has jurisdiction over this matter and venue is proper pursuant to 26 U.S.C. Sec. 1331 as this action involves a federal question concerning a treaty made by the United States of America, and pursuant to 28 U.S.C. Sec. 1362 as this matter involves an action by a federally recognized Indian nation.

FIRST CAUSE OF ACTION

V.

Plaintiff is a federally recognized Indian Nation with which the United States of America entered into a treaty entitled *Treaty with the Yakimas*, 12 Stat. 951. In said *Treaty with the Yakimas*, the Yakima Nation reserved from other lands ceded to the United States, lands designated as the Yakima Indian Reservation which is for the exclusive use and benefit of the Yakima Nation and its members. The Yakima Nation also retained its sovereign right to be self-governing and to make and enforce its own laws. Subsequent to said *Treaty with the Yakimas*, the Yakima Nation has maintained its tribal sovereignty and existence and continues to be self-governing, providing essential governmental services to its members and

non-members within the exterior boundaries of the Yakima Indian Reservation.

VI.

In connection with its reserved powers of self-government, the Yakima Nation owns and operates a considerable amount of land within the exterior boundaries of the Yakima Indian Reservation. Title to such land is held both in a restricted trust status for the benefit of the Yakima Nation, and in unrestricted fee patent status.

VII.

Defendant Yakima County, by and through defendant treasurer, imposes ad valorem real estate taxes under the authority of RCW 84.52.010 et seq. Said defendants have been collecting such ad valorem taxes under the provisions of RCW 84.56.010 et seq., RCW 84.60.010 et seq., RCW 84.64.010 et seq., and RCW 84.68.010 et seq.

VIII.

In addition to imposing ad valorem taxes on fee patent land owned by the Yakima Nation, defendants are also imposing ad valorem taxes upon fee patent land located within the Yakima Indian Reservation which is owned by enrolled members of the Yakima Nation who have not severed tribal relations.

IX.

The imposition of ad valorem property taxes upon fee patent land owned by the Yakima Nation and/or its members violates the provisions of Article 26 of the Constitution of the State of Washington. Article 26 of the State Constitution does not permit the State or defendant County to impose ad valorem taxes upon real estate owned by the Yakima Nation and/or its members on property owned within the Yakima Indian Reservation unless said property is owned by members of the Yakima Nation who

have severed tribal relations. The imposition of ad valorem taxes by defendants on fee patent land owned by the Yakima Nation and its members within the Yakima Indian Reservation is therefore, unlawful and illegal.

X.

The imposition of an ad valorem tax against the fee patent land of the Yakima Nation and its members intrudes upon and interferes with the ability of the Yakima Nation to make its own laws and govern itself and its members. The United States Congress has not authorized nor consented to the imposition of an ad valorem tax on the land of the Yakima Indian Reservation owned by the Yakima Nation and/or its members. Therefore, the existing and continuing efforts by the defendants to impose and collect ad valorem taxes from the Yakima Nation and its members with regard to fee patent land within the boundaries of the Yakima Indian Reservation is unlawful and illegal.

XI.

The defendants have scheduled a public tax sale of approximately 40 parcels of real estate located within the Yakima Indian Reservation in which the Yakima Nation and/or its members have a fee patent interest. Said sale is scheduled for November 20, 1987. Unless said sale is enjoined and restrained by the Court, the plaintiff and its members will suffer irreparable harm.

XII.

Plaintiff is entitled to a judgment declaring that fee patent land located within the Yakima Indian Reservation which is owned by the Yakima Nation and/or its enrolled members who have not served their tribal relations within the boundaries of the Yakima Indian Reservation are not subject to State or County ad valorem taxes.

SECOND CAUSE OF ACTION

XIII.

Plaintiff realleges Paragraphs No. I through IV and Paragraphs No. V through VI as though set forth herein in full.

XIV.

The Yakima Nation and its enrolled members occasionally sell fee patent land located within the exterior boundaries of the Yakima Indian Reservation. Defendants impose a real estate excise tax pursuant to the provisions of RCW 82.45.010 et seq. upon the Yakima Nation and its members in order to consummate such sales.

XI. [sic]

The actions of the defendants regarding the imposition of an excise tax on real estate sales under the provisions of RCW 82.45.010 et seq. upon the Yakima Nation and its enrolled members are invalid and illegal as such actions infringe upon the sovereignty of the Yakima Nation and its treaty reserved right to make its own laws and govern its own people. Defendants have no lawful authority to impose or collect said excise taxes. Plaintiff is entitled to a judgment declaring that the sales of fee patent land located within the exterior boundaries of the Yakima Indian Reservation by the Yakima Nation and its members are not subject to the excise tax otherwise imposed by RCW 82.45.010 et seq.

WHEREFORE, plaintiff prays for judgment against the defendants as follows:

1. For a temporary restraining order and an injunction against the defendants prohibiting the sale of approximately 40 parcels of real estate in which enrolled members of the Yakima Nation who have not severed their tribal relations have an interest in. [sic]

2. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of ad valorem taxes upon the fee patent land of the Yakima Nation and its tribal members who have not severed tribal relations within the exterior boundaries of the Yakima Indian Reservation.

3. For an injunction against the defendants prohibiting said defendants from the levy, imposition or collection of the excise tax imposed by RCW 82.45.010 et seq., for sales of real estate located within the exterior boundaries of the Yakima Indian Reservation.

4. For such other and further relief as to the Court seems just and proper.

5. For plaintiff's costs and disbursements incurred herein.

DATED this 6th day of November, 1987.

/s/ Tim Weaver
TIM WEAVER
Attorney for Plaintiff

/s/ Wayne Bjur
R. WAYNE BJUR
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,

Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

AFFIDAVIT OF HARVEY ADAMS

[Filed Nov. 12, 1987]

STATE OF WASHINGTON)
) ss
COUNTY OF YAKIMA)

HARVEY ADAMS being first duly sworn on oath,
deposes and says:

1. That you [sic] affiant has personal knowledge of the facts stated in this affidavit and is competent to testify as to the same. That your affiant makes this affidavit in support of the request that the public tax sales scheduled for November 20, 1987, of land located within the Yakima Indian Reservation in which tribal members have an interest, should be restrained until the conclusion of the above-captioned proceedings.

2. That your affiant is a duly elected member of the Yakima Nation Tribal Council. That your affiant serves as chairman of the Land Committee of the Tribal Coun-

cil and is charged with the responsibility of overseeing land issues and concerns of the Yakima Nation and its members. That in this regard, your affiant has investigated the public tax sales of real property which Yakima County intends to conduct on November 20, 1987. Your affiant has determined that several members of the Yakima Nation have land scheduled for tax sale. That your affiant believes that Yakima County has no lawful authority to impose ad valorem property taxes against the reservation lands of Yakima tribal members and is requesting the Court to restrain such sales.

3. In the course of your affiant's duties and investigation of this problem, your affiant certifies to the Court that the following enrolled individuals have an interest in fee patent land located within the exterior boundaries of the Yakima Indian Reservation. The names and tax parcel numbers of the reservation properties involved are as follows:

NAME	PARCEL NO.	LOCATION
John (Puyette), Patricia	171005-23435	Harrah, WA
Teo, Harris J., Jr.	171005-32458	Harrah, WA
Brown, George J.	171005-32476	Harrah, WA
Brown, Betty Whitefoot		
Brown, George J.	171005-32477	Harrah, WA
Brown, Betty Whitefoot		
Ike, Duane	171005-32487	Harrah, WA
Phillips, Otis M.	171017-33404	Harrah, WA
Shawaway, Lila F.		
Walker, Linda M.	171130-33004	Harrah, WA
Walker, Linda M.	171130-33006	Harrah, WA
Howard, Larry A.	181126-33014	Harrah, WA
Howard, Augustine Phillips		
Villarreal, Betty J.	181134-11419	Harrah, WA
Jack, Norma M.	191111-33522	Wapato, WA
Jackson, Nellie Stahi	191115-13527	Wapato, WA
George, Melissa	191124-22003	Progressive Rd., Wapato, WA

NAME	PARCEL NO.	LOCATION
Olney, Helen M.	191125-31409	Wapato, WA
Harrison, Floyd Bill	201003-31515	Toppenish, WA
Young, Raymond B.	201003-32417	Toppenish, WA
Elwell, Galen L.	201003-42488	Toppenish, WA
Elwell, Bertha M.		
George, Ross L.	201003-42498	Toppenish, WA
George, Georgette F.		
Elwell, George Jr.	201004-13430	Toppenish, WA
Pinkham, Jonathan B.	201004-24447	Toppenish, WA
Pinkham, Yvonne L.		
Hansen, Martha Clark	201004-41406	Toppenish, WA
Totus, Iola (Smartlowit)	201004-44482	Toppenish, WA
Smiscon, Harry J.	201010-23507	Toppenish, WA
Tulee, Clifford B.	201014-23008	Yost Road, Toppenish, WA
Wahsise, Flora Nye	201132-33026	McDonald Road, Toppenish, WA
Smith, Sharon (Totus)	201003-31510	Toppenish, WA

All of the above-described parcels are located within the exterior boundaries of the Yakima Indian Reservation.

DATED this 12 day of November, 1987.

/s/ Harvey E. Adams
HARVEY ADAMS

SIGNED AND SWORN to before me this 12th day of November, 1987.

/s/ Robert Wayne Bjur
Notary Public in and for the
state of Washington, residing
at Yakima.

My commission expires:
8-15-90

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

AFFIDAVIT OF VERA HERNANDEZ

[Filed Nov. 12, 1987]

STATE OF WASHINGTON)
) ss
COUNTY OF YAKIMA)

VERA HERNANDEZ being first duly sworn on oath,
deposes and says:

1. That your affiant has personal knowledge of the facts stated in this affidavit and is competent to testify as to the same. That your affiant is presently employed by the Yakima Nation, in Toppenish, Washington. That your affiant is employed as the enrollment clerk and is charged with the duties of maintaining the roll of enrolled members of Yakima Indian Nation. That your affiant makes this affidavit to certify to the Court that the following persons are enrolled members of the Yakima Indian Nation.

2. Your affiant has reviewed the tribal rolls which are maintained in the ordinary course of business at the Bureau of Indian Affairs, at the headquarters of the government of the Yakima Indian Nation located near Toppenish, Washington. Your affiant is also personally acquainted with the persons described hereinbelow who are known to be enrolled members of the Yakima Indian Nation. Your affiant certifies that the following persons are, in fact, enrolled members of the Yakima Nation who have been enrolled pursuant to federal and tribal law and who have not severed relations with the Yakima Nation.

NAME	ENROLLMENT NUMBER
John (Puyette), Patricia	4330
Teo, Harris J. Jr.	4972
Brown, George J.	368
Brown, Betty Whitefoot	3157
Ike, Duane	3485
Phillips, Otis M.	2054
Shawaway, Lila F.	5530
Walker, Linda M. (Davis)	4766
Howard, Larry A.	2648
Howard, Augustine Phillips	2048
Villarreal, Betty J.	3149
Jack, Norma M.	3555
Jackson, Nellie Stahi	2675
George, Melissa	5039
Olney, Helen M.	4190
Fiander, Charlene R.	3716
Harrison, Floyd Bill	3820
Young, Raymond B.	3663
Elwell, Galen L.	4840
Elwell, Bertha M.	5845
George, Ross L.	3733
George, Georgette F.	1578
Elwell, George Jr.	6749
Pinkham, Jonathan B.	3777
Pinkham, Yvonne L.	4008
Hansen, Martha Clark	496

NAME	ENROLLMENT NUMBER
Totus, Iola S.	2488
Smiscon, Harry J.	3970
Tulee, Clifford B.	2849
Wahsise, Flora Nye	2975
Smith, Sharon (Totus)	4386

DATED this 12th day of November, 1987.

/s/ Vera Hernandez

SIGNED AND SWORN to before me this 12th day of November, 1987.

/s/ Robert Wayne Bjur
 Notary Public in and for the
 state of Washington, residing
 at Yakima.
 My commission expires: 8-15-90

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Plaintiff,
vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

**AGREED ORDER TEMPORARILY RESTRAINING
FORECLOSURE SALE OF CERTAIN
INDIAN PROPERTIES**

[Filed Nov. 20, 1987]

This action having been brought by the Confederated Tribes and Bands of the Yakima Indian Nation on behalf of their members and in particular of certain members who own interests in fee lands within the Yakima Indian Reservation, such lands and their Yakima Indian owners being identified in the affidavit of Harvey Adams on file in this court and cause; and on the Supplemental Affidavit of Harvey Adams to be filed with respect to parcels 191122-11438 and 201003-42497 and appearing that the said properties are now scheduled to be sold pursuant to the Judgment of the Superior Court of the State of Washington in and for Yakima County to foreclose state ad valorem tax liens on Friday, November 20, 1987; and

The Plaintiffs' having brought this matter before this court on Motion for Temporary Restraining Order or Preliminary Injunction to prevent the Defendants herein

from a conducting foreclosure sale of said properties, as currently scheduled, on November 20, 1987; and

It appearing that there is no general right of redemption following state ad valorem tax foreclosure sale in the state of Washington, according to RCW 84.64, and that therefore the potential harm to the Indian owners identified herein from sale of their properties is much greater than the potential harm to the defendants, Yakima County and the Yakima County Treasurer, from delay of the scheduled sale of these properties; and,

The parties agreeing to the entry of this order, Defendants doing so without waiving arguments as to standing and jurisdiction, and the Court finding good cause for the entry hereof; now, therefore,

IT IS HEREBY ORDERED that, until this Court's determination of the merits herein or until further order of this Court, the Defendants herein, Yakima County and Yakima County Treasurer, are temporarily restrained from selling the above-mentioned, Yakima Indian-owned real properties, specifically, those properties identified in Yakima County Treasurer's records by the following numbers:

171005-23435	191125-31409	191122-11438
171005-32458	201003-31515	
171005-32476	201003-32417	
171005-32477	201003-42488	
171005-32487	201003-42498 & 42497	
171017-33404	201004-13430	
171130-33004	201004-24447	
171130-33006	201004-41406	
181126-33014	201004-44482	
181134-11419	201010-23507	
191111-33522	201014-23008	
191115-13527	201132-33026	
191124-22003	201003-31510	

DATED this 12th day of November, 1987.

/s/ Alan A. McDonald
ALAN A. McDONALD, Judge
United States District Court

Presented by:
/s/ John V. Staffan
JOHN V. STAFFAN
Deputy Prosecuting Attorney
Attorney for Defendants

TIM WEAVER/R. WAYNE BJUR
Cockrill, Weaver & Bjur, P.S.
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Plaintiff,
vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

MOTION FOR SUMMARY JUDGMENT

COMES NOW the plaintiff and moves the Court for an order granting a summary judgment in the above-captioned matter. This motion is based on the affidavit of Harvey Adams, affidavit of Ray Olney, Jr., memorandum in support thereof, and upon the records and files herein. This motion is made pursuant to FrCP 56.

DATED this 7th day of March, 1988.

/s/ R. Wayne Bjur
R. WAYNE BJUR of
Cockrill, Weaver & Bjur, P.S.
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854AAM

CONFEDERATED BANDS AND TRIBES
OF THE YAKIMA INDIAN NATION,
Plaintiff,
vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

AFFIDAVIT OF RAY E. OLNEY
IN SUPPORT OF SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

RAY E. OLNEY being first duly sworn on oath, deposes and says:

1. That your affiant is a duly elected member of the Tribal Council of the Yakima Indian Nation. That your affiant currently serves as chairman of the taxation committee of the Tribal Council. That your affiant has personal knowledge of the facts stated in this affidavit and is competent to testify as to the same. That your affiant makes this affidavit in support of the Yakima Nation's position that tribal members and the Tribe itself are exempt from ad valorem property taxes with regard to

fee patent land owned within the exterior boundaries of the Yakima Indian Reservation.

2. The Yakima Nation is a sovereign Indian nation retaining the right to govern and make its own laws since the time of entering into the *Treaty With the Yakimas*, 12 Stat. 951.

3. In the 1984 through 1987 fiscal years, in excess of \$5,000,000.00 per fiscal year of tribal income has been expended to fund tribal governmental programs. The vast majority of tribal income is derived from the sale of timber from and the lease of unallotted tribal lands. Tribal governmental programs receiving a portion of the \$5,000,000.00 of tribal income include programs such as:

Law Enforcement

Court System

Public Works (Solid Waste Disposal, Water and Sewer, etc.)

Health Care (Medical Services, Alcohol Rehabilitation, etc.)

Education

Wildlife and Fish Management

Governmental Operations (Zoning, Water Administration, etc.) These governmental services benefit the 7,200 (approximate) enrolled members of the Yakima Nation. No enrolled member of the Yakima Nation may sever his or her tribal relation and remain enrolled. Some of these governmental services, such as law enforcement and waste disposal, also benefit the non-enrolled population of the Yakima Indian Reservation.

4. If the government of the Yakima Nation did not exist, an additional \$700.00 (approximate) per year would be distributed to each enrolled member of the Yakima Nation from tribal income. Stated another way, each enrolled member of the Yakima Nation is charged

approximately \$700.00 per year to fund tribal governmental services. Simple multiplication demonstrates that an average family of four tribal members pay approximately \$2,800.00 per year to fund governmental services.

5. The Yakima Nation has the power and authority to impose a property tax upon the fee patent lands of tribal members. The Yakima Tribal Council has made considerable inquiry and study of possible taxing programs to assist in the funding of tribal government. However, the Tribal Council has not adopted a property taxing scheme as it is the view of the Yakima Nation Tribal Council that its enrolled members are already charged more than a fair share of the costs of funding tribal governmental programs.

6. Your affiant believes that by requiring tribal members and the Yakima Nation to contribute to the costs of state and county government, the state and county is intruding into and infringing upon the integrity of the tribal government. The payment of property taxes by the Yakima Nation itself is nothing more than a direct loss of funds which would otherwise be available to fund tribal governmental programs. The payment of property taxes by enrolled members of the Yakima Nation has the unmistakable effect of removing money from the local Indian economy. This loss of money requires the tribal government to provide services such as health care, public works, and education, to tribal members who may have had an ability to pay for the services privately. In short, the Yakima Nation spends monies for governmental services which it would not otherwise have to when its enrolled members are required to pay taxes to the state and county jurisdictions.

7. Finally, your affiant would point out that enrolled tribal members who pay property taxes are in essence being taxed to fund the costs of two governments. As

pointed out hereinabove, each member of the Yakima Nation contributes approximately \$700.00 per year toward the costs of funding tribal governmental programs. In addition, tribal members who own fee patent land are now required to pay property taxes to Yakima County. Conversely, non-Indian residents of the Yakima Indian Reservation do not contribute in any significant way to the costs of funding the tribal government. Non-Indian property owners pay their property taxes to Yakima County. Your affiant believes this circumstance to be fundamentally unfair in addition to being a violation of the decision of the United States Supreme Court over the last 15 years.

DATED this 8th day of March, 1988.

/s/ Ray E. Olney
RAY OLNEY

SIGNED AND SWORN to before me this 8th day of March, 1988.

/s/ Joyce Pinkham
Notary Public in and for the
state of Washington, residing
at Wapato Wa.
My commission expires: 11/3/91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C87-854-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA and DALE GRAY,
Yakima County Treasurer,
Defendants.

AFFIDAVIT OF R. WAYNE BJUR

STATE OF WASHINGTON)
) ss
COUNTY OF YAKIMA)

R. WAYNE BJUR being first duly sworn on oath,
deposes and says:

1. That your affiant is an attorney for the plaintiff in the above-captioned matter. That your affiant has personal knowledge of the facts stated in this affidavit. That your affiant makes this affidavit for the purpose of identifying the exhibit attached hereto.

2. Attached hereto as Exhibit "A" and by this reference incorporated herein, is an accurate illustration of a map of the area ceded to the United States by the *Treaty with the Yakimas*, 12 Stat. 951. Included within the ceded area as illustrated is the Yakima Indian Reservation which area of land was reserved by said treaty

for the exclusive use and benefit of the Yakima Indian Nation. This illustration of the ceded area is provided to the Court in conjunction with the Court's analysis of 25 U.S.C. Sec. 608(a).

DATED this 4th day of April, 1988.

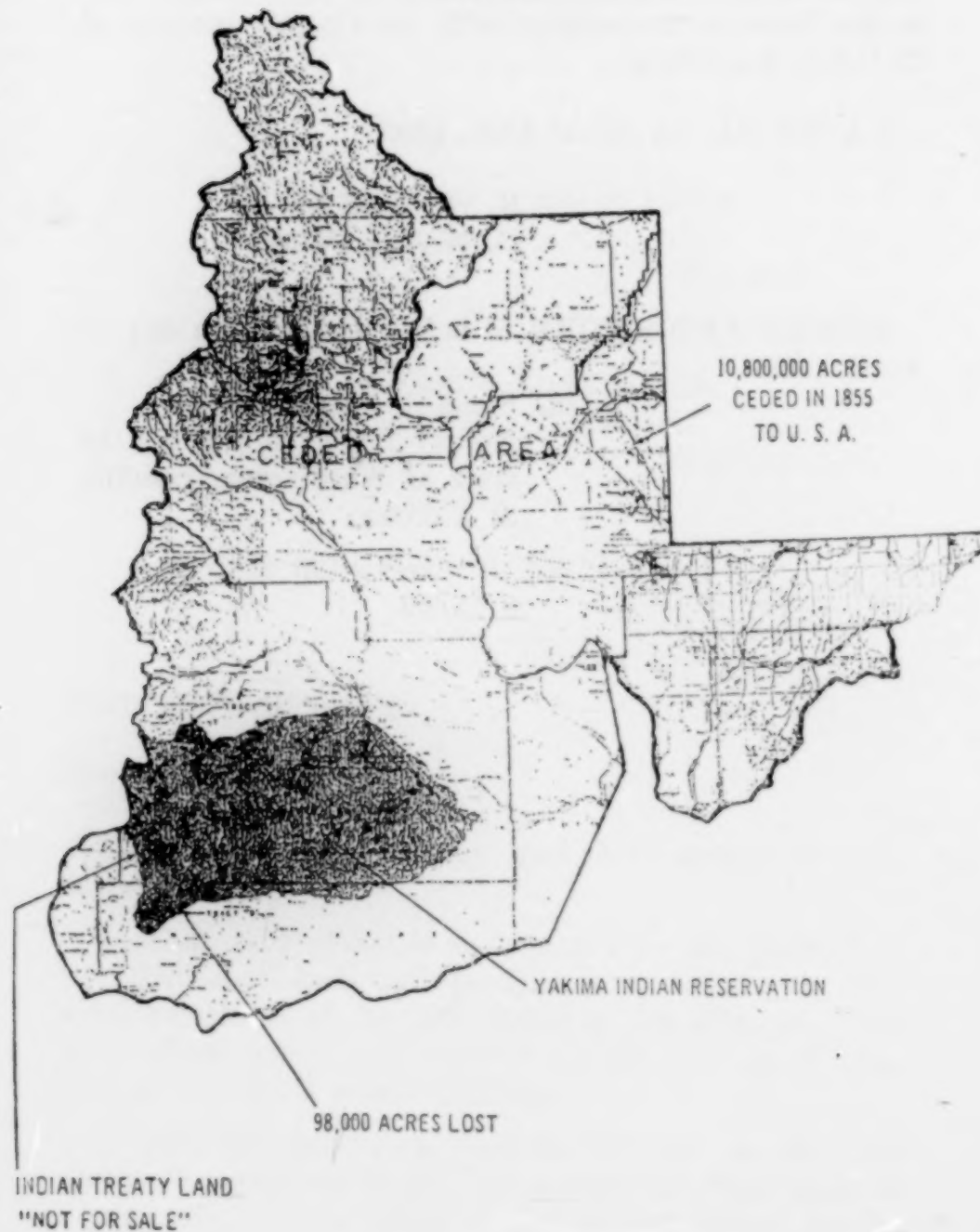
/s/ R. Wayne Bjur
R. WAYNE BJUR

SIGNED AND SWORN to before me this 4th day of April, 1988.

/s/ Sonia R. Noe
Notary Public in and for the
state of Washington, residing
at Yakima.

My commission expires:
3/15/90

EXHIBIT A



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA and DALE GRAY,
Yakima County Treasurer,
Defendants.

CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT

Defendants herein, County of Yakima and Yakima County Treasurer, by the undersigned attorney, hereby move this Court for partial summary judgment in this cause. Specifically, Defendants request a judgment from this Court that (1) any and all ad valorem taxes levied and collected by Defendants on Indian-owned lands within the Yakima Indian Reservation are lawful where such lands have previously been conveyed by fee-patent to individual Indians according to the Indian General Allotment Act, and that (2) any real estate excise taxes collected by Defendants on the sale of such lands are lawful where such lands have previously been conveyed by fee-patent to individual Indians according to the Indian General Allotment Act.

This motion is based on FRCP 56 and the record and file herein.

Defendants specifically allege, in support of this motion that there is no genuine issue as to the following material facts:

1. There exist some real properties within the Yakima Indian Reservation which have, in the past, been patented in fee to individual Indians according to the Indian General Allotment Act, 25 USC 331, et seq.

2. Defendants levy and collect ad valorem taxes on these properties.

3. Defendants collect real estate excise taxes on the sale of these lands when they are sold.

DATED this 1st day of April, 1988.

/s/ John V. Staffan
JOHN V. STAFFAN
Deputy Prosecuting Attorney
Attorney for Defendants

JVS1(F)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

AFFIDAVIT OF NANCY DAVIDSON
RE: EXCISE TAX ON SALE OF
RESERVATION INDIAN LANDS

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

I, NANCY DAVIDSON, being first duly sworn on oath, now state:

I am now, and since October, 1985, have been the duly qualified, appointed and acting Assistant Yakima County Treasurer. As such I am familiar with the policies and practices of Yakima County regarding collection of real estate excise taxes under RCW 82.45, and I assist the County Treasurer in seeing that these taxes are collected according to law. This office collects real estate excise taxes on the sale of only those properties listed on Yakima County's tax rolls by the Yakima County

Assessor as taxable, i.e., liable for ad valorem taxation. This office does not collect real estate excise taxes on the sale of any properties the Yakima Indian Reservation which are not listed on the County tax rolls as liable for ad valorem taxes.

/s/ Nancy Davidson
NANCY DAVIDSON
Assistant County Treasurer

SUBSCRIBED AND SWORN TO before me this 1st day of April, 1988.

/s/ John Monter
Notary Public in and for the State
of Washington, residing at Yakima.
Expire 11/1/88

JVS1(E)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854-AAM

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,

vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

**AFFIDAVIT OF RALPH HUCK
RE: TAXATION OF INDIAN LANDS**

STATE OF WASHINGTON)
) SS
COUNTY OF YAKIMA)

I, RALPH HUCK, being first duly sworn on oath, now state:

I am the duly qualified, elected and acting Assessor for Yakima County, Washington. I have served in this capacity continuously since January, 1975. For five years prior to 1975, I worked as an appraiser in the office of the Yakima County Assessor. Among the duties of my office, I (with staff assistance) list and value of all taxable properties in Yakima County for purposes of ad valorem taxation.

It is the policy and practice of my office to list on the ad valorem tax rolls no tribal-owned or individual-Indian-

owned properties, except those which have either (1) been the subject of fee-patents as provided for in the Indian Allotment Act, or (2) been divided, through mesne conveyances, inheritance, or otherwise, into fractional tenancies in common between or among Indians and non-Indians. This latter group of properties are taxed only to the extent of the non-Indian fractional interest.

/s/ Ralph Huck
RALPH HUCK
Yakima County Assessor

SUBSCRIBED AND SWORN to before me this 1st day of April, 1988.

/s/ John Monter
Notary Public in and for the State
of Washington, residing at Yakima.
expire 11/1/88

JVS1(D)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-854-AAM.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,
Plaintiff,
vs.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

ANSWER OF YAKIMA COUNTY AND
YAKIMA COUNTY TREASURER TO
PLAINTIFF'S COMPLAINT

Defendants Yakima County and Yakima County Treasurer, by and through the undersigned attorney, answer the respective allegations in plaintiff's Complaint for Declaratory Judgment and for Injunctive Relief as follows:

I.

Defendants admit the allegations of plaintiff's paragraph I as to status and capacity. Defendants deny, for lack of knowledge, that the persons whose real properties are the subject of this case, are Yakima tribal members residing within the boundaries of the Yakima Reservation. Defendants also deny, for lack of knowledge, that this action is brought "in place of the United States of America".

II.

Defendants admit the allegations made in paragraph II of plaintiff's complaint.

III.

Defendants admit the allegations made in paragraph III of plaintiff's complaint.

IV.

Defendants deny the allegations made in paragraph IV of plaintiff's complaint.

V.

Defendants admit that the United States recognized the Yakima Indian Nation in the Treaty with the Yakimas and that the Treaty reserved certain described lands designated as the Yakima Reservation for the exclusive use and benefit of the Confederated Tribes and Bands of the Yakima Indians. Defendant's deny that the Treaty reserved these lands for the exclusive use and benefit of individual Yakima members. Defendants admit that the Yakima Nation retained some degree of sovereignty and power to self-govern, but defendants assert that the scope of this sovereignty and power to self-govern has been narrowed by Congress since the making of the Treaty. Defendants admit that plaintiff provides governmental services to its members. Defendants deny that plaintiff provides services to non-members. Defendant's deny all other allegations made in Paragraph V of plaintiff's complaint.

VI.

Defendants admit that the Yakima tribe owns considerable real property within the exterior boundaries of the Yakima Reservation, some of which is trust land and some of which is in unrestricted fee patent status. Defendants deny, for lack of knowledge, that these tribal lands are "owned and operated" under reserved powers of tribal self-government.

VII.

Defendant Yakima County admits that it levies certain ad valorem taxes on real properties within Yakima County. This is done under authority of RCW 36.40 and 84.52. It is not done by the County Treasurer, as alleged by plaintiff. Defendants admit that the Yakima County Treasurer collects Yakima County's ad valorem real property taxes under authority of RCW 84.56, 84.60 and 84.64, and receives some payments under protest as provided for in RCW 84.68.020.

VIII.

Defendants admit that Yakima County ad valorem taxes are levied and collected on fee patent lands within the Yakima Reservation, some owned by the Yakima Nation and some by individual members of the Yakima Nation. For lack of knowledge as to the tribal relations of those tribe members whose properties are taxed, defendants deny that these members have not severed tribal relations.

IX.

Defendants deny each and all of the allegations of paragraph IX of plaintiff's complaint.

X.

Defendants deny each and all of the allegations of paragraph X of plaintiff's complaint.

XI.

Defendants deny that the plaintiff and its members will suffer irreparable harm from the planned tax sale, if and when held. Defendants admit the other allegations of paragraph XI of plaintiff's complaint.

XII.

Defendants deny the allegation of paragraph XII of plaintiff's complaint.

XIII.

Defendants answer the same as in paragraphs I through VI hereinabove.

XIV.

Defendants admit the allegation in paragraph XIV of plaintiff's complaint that the excise tax is imposed but deny that the tax is part of the consummation of any sale.

XV.

Defendants deny each and all of the allegations of the fifteenth numbered paragraph (mis-numbered as the second Paragraph XI) of plaintiff's complaint.

AFFIRMATIVE ALLEGATION

XVI.

Further, Defendants affirmatively allege that the taxes challenged herein are authorized by the Indian General Allotment Act, as amended, 25 USC 331, et. seq., and more specifically by 25 USC 349.

PRAYER

WHEREFORE, defendants respectfully pray the court for judgment:

1. Vacating the Agreed Order Temporarily Restraining Foreclosure Sale herein, dated November 17, 1987, (Court of Record No. 9) ; and
2. Denying all other relief requested by plaintiff; and
3. Declaring the taxes challenged herein to be lawful; and
4. Awarding defendants their costs against plaintiff; and

5. Granting such other relief as is just and lawful.

DATED this 6th day of April, 1988.

/s/ John V. Staffan
JOHN V. STAFFAN
Deputy Prosecuting Attorney
Attorney for Defendants
Room 329 County Courthouse
Yakima, WA 98901
(509) 575-4141

JVS1(B)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-87-654-AAM

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION,
Plaintiff,
vs.

COUNTY OF YAKIMA; and DALE A. GRAY,
Yakima County Treasurer,
Defendants.

**STIPULATION OF FACTS
FOR SUMMARY JUDGMENT**

[Filed April 26, 1988]

Pursuant to this Court's order of April 11, 1988 herein, the parties agree to and submit for the Court's consideration the following facts relating to benefits (as between State and County government on one hand and Yakima Indian Nation tribal government on the other hand) and to the pattern of fee land ownership within the Yakima Indian Reservation. The parties attorneys have reviewed each other documentary support for the facts recited herein and find all to be prima facie valid. However, this fact stipulation is only for purposes of the pending cross-motions for summary judgment, as in such cases the facts as presented by non-moving parties are presumed to be true. In the event of a trial of this cause, the parties reserve the right to challenge and require proof of these facts according to applicable discovery and evidence rules.

LANDS, POPULATION AND OWNERSHIP

1. The Yakima Indian Reservation consists of approximately one million, three hundred thousand acres of land, located almost entirely in Yakima County.

2. The Yakima Indian Nation owns some interest in approximately seventy-five parcels of fee-patented land within the Yakima Indian Reservation. Most of these interests are fractional. The total assessed value of the partially tribal owned lands is five million, four hundred four thousand, nine hundred sixty dollars (\$5,404,960). The total assessed value of the Yakima Tribe's interest in these lands is one million, two hundred fifty two thousand, seven hundred twenty six dollars (\$1,252,726). The sum of ten thousand, seven hundred eighteen dollars and seventy five cents (\$10,718.75) in state and local ad valorem taxes was levied by defendant Yakima County against the Yakima Nations share of these lands for the year 1987.

3. The Yakima Indian Nation has 7,604 enrolled members. Approximately 4,500 of these members reside within the boundaries of the Yakim Reservation. Approximately 104 individual members of the Yakima Nation are known to own a total of 139 parcels of fee-patented land within the Yakima Indian Reservation. Of these 139 parcels, 72 are residential lots whose acreages are not known to the parties. Of these residential lots, 33 are in Toppenish, 17 in Wapato, 14 in White Swan. The remaining 67 parcels comprise a total of 1,335.68 acres, and their total assessed value is \$4,580,420. The parties believe most of the individual Yakima Indian owned parcels within the Yakima Reservation have been identified and will jointly advise the Court of others, when identified, if requested by the Court.

4. A map of the Yakima Indian Reservation is submitted herewith to illustrate the locations of the fee-patented lands referred to herein. This map is marked

in blue to indicate the individual Indian owned parcels hereinabove mentioned, in red to indicate those lands above mentioned in which the Yakima Tribe has interests, and the other fee-patented lands within [sic] the Reservation are colored in grey.

5. According to the most recent (1980) U.S. Census data, the total population of the Yakima Indian Reservation is 25,363. 24,720 of these are from the Yakima County portion of the Reservation and 643 from the Klickitat County portion. The same 1980 Census showed 4,983 Indian inhabitants of the Yakima Reservation, without regard to tribal affiliation, 4,919 of whom are from the Yakima County portion of the Reservation and 64 from the Kittitas County portion.

LAW ENFORCEMENT

6. The Yakima Indian Nation expended approximately \$625,000 in 1987 providing law enforcement service within the exterior boundaries of the Yakim Indian Reservation. Tribal Police officers work approximately fifty (50) eight-hour shifts per week patrolling the open area of the Reservation. Approximately 20% of arrests and traffic citation by Tribal Police involve non-members of the Yakima Indian Nation. Approximately 11% of other Tribal Police patrol contacts are for the assistance of other law enforcement agencies. There are other Tribal Police contacts with non-members, but the number and volume of these is not known. All Tribal officers are cross-deputized by the Yakima County Sheriff, and all Yakima County Sheriff's officers are cross-deputized by the Yakima Tribal Police. Yakima Tribal officers enforce state as well as Tribal laws and are eligible for training at the Washington State Police Training Academy at no charge to the Yakima Tribal Police or Yakima Indian Nation.

7. The Yakima County Sheriff's Department expended approximately \$779,441 in 1987 providing law enforce-

ment service to the area included within the exterior boundaries of the Yakima Indian Reservation. Yakima County Sheriff's deputies work approximately thirty-one eight-hour shifts per week, patrolling within the Yakima Reservation.

8. In 1987, Yakima County expended \$3,253,252 to operate and maintain the Yakima County Jail, \$1,178,026 to operate the office of the Yakima County Prosecutor, and \$399,506 to provide public defender services in Yakima County courts. Of 112,617 prisoner days served in the Yakima County Jail in 1987, 10,082 days (or 8.95%) were served by Indians, without regard to tribal affiliation.

LAND USE REGULATION

9. Land use regulation by the Yakima Indian Nation prior to October 1987, was minimal. However, the Yakima Indian Nation has budgeted \$50,000 for land use regulation (of both trust and fee lands) within the Yakima Reservation, for the fiscal year ending October, 1988. Approximately two-thirds of the recent land use applications of the Yakima Indian Nation have been from non-members of the Yakima Nation and related to fee lands.

10. Through calendar year 1987, Yakima County has regulated land use of fee patented lands within the Yakima Indian Reservation. Authority for this regulation is the subject of other pending litigation. 6.4% of the cases worked by the Yakima County Planning Department from 1983 through 1987 involved regulation of fee lands within the Yakima Indian Reservation. The total expenditure of the Yakima County Planning Department for land use regulation in the year 1987 was \$355,994.

PUBLIC WORKS

11. Yakima County owns and maintains 1,770 miles of roads, 490 miles of which are within the Yakima In-

dian Reservation. In 1987, the Yakima County Public Works Department expended \$5,017,162 on maintenance of County roads, including \$1,031,674 on the 490 miles of County roads within the Yakima Indian Reservation. In 1987, Yakima County Public Works also expended \$3,755,368 on County road construction, including \$586,253 on road construction within the Yakima Indian Reservation.

12. The unincorporated area within the Yakima Indian Reservation is served by Eastman Disposal Service, a private refuse hauler which contracts with individual occupants and owners for this service. The solid waste disposal customers of Eastmont Disposal include both members and non-members of the Yakima Indian Nation. The Yakima Indian Nation paid \$13,904 to Eastmont Disposal Service in the past fiscal year, to subsidize the collection of solid waste by Eastmont.

MISCELLANEOUS SERVICES

13. Yakima County provides other services to Yakima's County residents, including residents of the Yakima Reservation and members of the Yakima Nation, without fees or charges. Among these are the conduct of public elections in which members of the Yakima Indian Nation participate, and recording of Yakima Tribal marriages.

14. The Yakima Nation administers various programs to Indians without regard to tribal affiliation. These include detox center, food commodity distribution, health care services.

SCHOOLS

15. There are five public school districts all or significant portion of which are located within the boundaries of the Yakima Reservation and which had Indian students enrolled in the 1986-87 school year. These are the Mt. Adams, Union Gap, Wapato, Toppenish and Granger districts.

16. The Mt. Adams School District received \$4,085,444 in state and local funds for the 1986-87 school year. 828 students were enrolled that year in the Mt. Adams District, of whom 281 were Indians. The Mt. Adams District also received, under PL 81-874, for the 1986-87 school year, \$871,102 in funds from the United States attributable to (1) students (both Indian and non-Indian) residing on Yakima Reservation trust lands and (2) students whose parents were employed by the Yakima Indian Agency.

17. The Union Gap School District received \$1,641,912 in state and local funds for the 1986-87 school year. 432 students were enrolled in the Union Gap District, of whom 23 were Indians. The Union Gap District also received, under PL 81-874, for the 1986-87 school year, \$2,859 in funds from the United States attributable to (1) students (both Indian and non-Indian) residing on Yakima Reservation trust lands and (2) students whose parents were employed by the Yakima Indian Agency.

18. The Wapato School District received \$7,868,444 in state and local funds for the 1986-87 school year. 2,578 students were enrolled that year in the Wapato School District, of whom 733 were Indians. The Wapato School District also received, under PL 81-874, for the 1986-87 school year, \$1,232,205 in funds from the United States attributable to (1) students (both Indian and non-Indian) residing on Yakima Reservation trust lands and (2) students whose parents were employed by the Yakima Indian Agency.

19. The Toppenish School District received \$7,675,273 in state and local funds for the 1986-87 school year. 2,515 students were enrolled that year in the Toppenish School District, of whom 418 were Indians. The Toppenish School District also received, under PL 81-874, for the 1986-87 school year, \$705,204 in funds from the United States attributable to (1) students (both In-

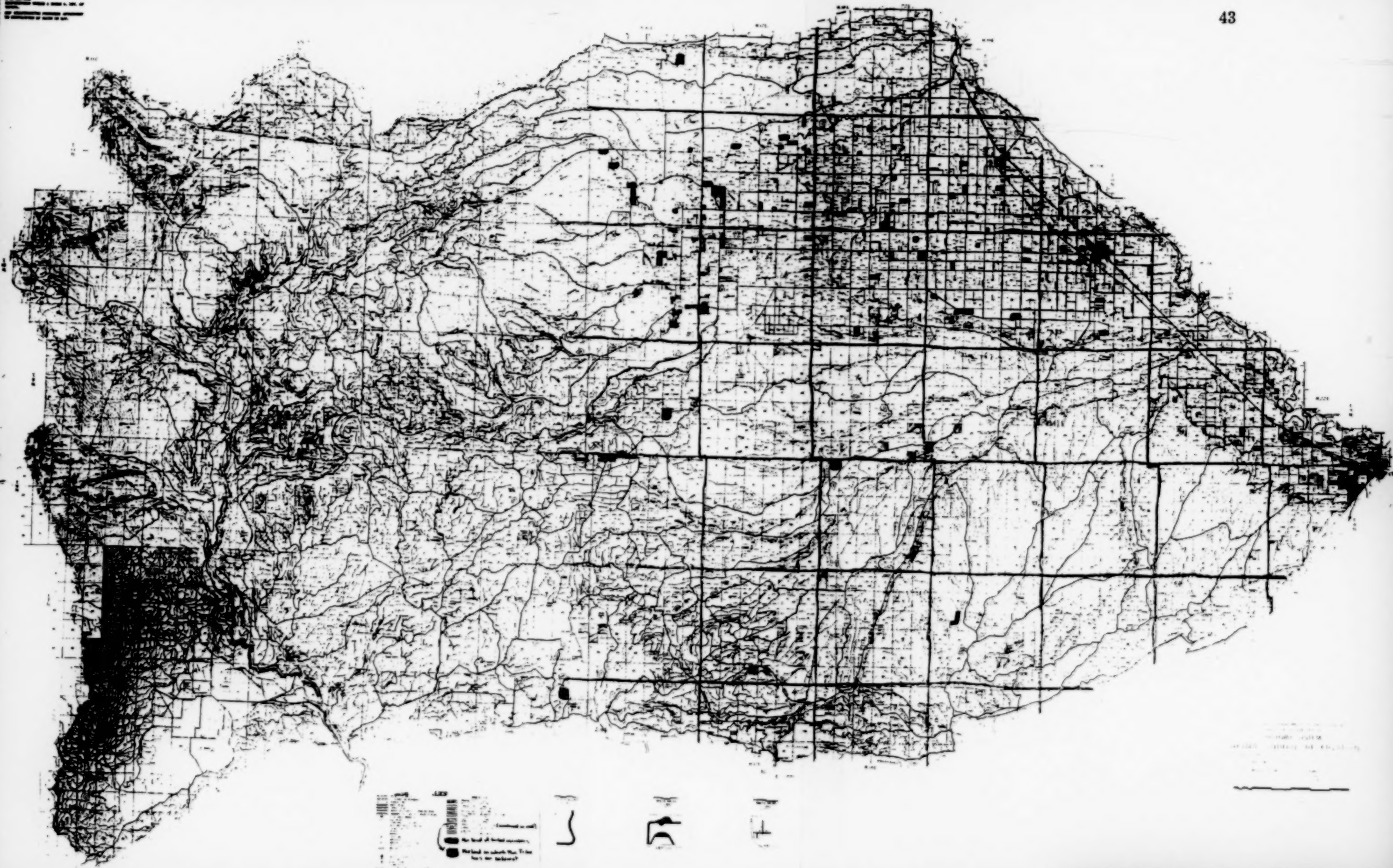
dian and non-Indian) residing on Yakima Reservation trust lands and (2) students whose parents were employed by the Yakima Indian Agency.

20. The Granger School District received \$3,050,075 in state and local funds for the 1986-87 school year. 886 students were enrolled that year in the Granger School District, of whom 81 were Indians. The Granger School District also received, under PL 81-874, for the 1986-87 school year, \$238,706 in funds from the United States attributable to (1) students (both Indian and non-Indian) residing on Yakima Reservation trust lands and (2) students whose parents were employed by the Yakima Indian Agency.

DATED this 25 day of April, 1988.

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BEST AVAILABLE COPY

IN THE SUPREME COURT
OF THE UNITED STATES

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
v. *Petitioners,*

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Respondent,

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
v. *Cross-Petitioner,*

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF PETITIONERS/CROSS-RESPONDENTS,
COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER**

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QUESTIONS PRESENTED

1. Has the authority for state taxation of Indian owned fee lands, granted by Congress in Section 6 of the General Allotment Act (25 U.S.C. 349), been withdrawn.

2. In light of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994, does the validity of state property taxes, upon Indian-owned fee lands within an Indian reservation, as authorized by Congress in 25 U.S.C. 349 (Indian General Allotment Act, Section 6), depend upon a case by case analysis of the economic, political, health and welfare effects of such tax upon the resident tribe?

3. Is the grant of authority in 25 U.S.C. 349 for the taxation of reservation Indians and their fee lands limited to ad valorem taxes, or does it extend to excise taxes on the sale of such fee lands?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
1. Congress has the power to authorize these taxes..	8
2. Congress has authorized the taxation of the lands involved in this case. That authority has not been withdrawn and subsequent acts of Con- gress are consistent with such taxation	11
3. The United States has repeatedly affirmed the view that reservation Indian fee lands, such as those involved in this case, are taxable	19
4. The decision of this Court in <i>Moe v. Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976) is not inconsistent with the tax authority asserted by Yakima County in this case	21
5. Other relevant cases from this Court support the taxation of these reservation Indian fee lands.....	26
6. The decision of this Court in <i>Brendale v. Confed. Tribes of Yakima</i> , 109 S.Ct. 2994 (1989), should not be taken as limiting or qualifying the state taxing authority of 25 U.S.C. 349	27

TABLE OF CONTENTS—Continued

	Page
7. The inclusion of reservation Indian fee land within "Indian country" for purposes of criminal jurisdiction or otherwise does not negate the taxability of the subject lands under Sec. 349	32
8. Relevant decisions of this Court support the application of excise taxes to the sale of otherwise taxable reservation Indian lands	35
9. A synthesis of applicable decisions of this Court affords a satisfactory test for state taxing power in this case	37
CONCLUSION	38
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>Administrator of FAA v. Robertson</i> , 95 S.Ct. 2140, 45 L.Ed.2d 164, 422 U.S. 255 (1975)	24
<i>Brendale v. Confed. Tribes</i> , — U.S. —, 109 S.Ct. 2994 (1989)	4, 5, 7, 27-32
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	21, 37
<i>Cherokee Tobacco v. United States</i> , 78 U.S. (11 Wall) 616 (1871)	8
<i>Cotton Petroleum v. New Mexico</i> , — U.S. —, 109 S.Ct. 1698 (1989)	29
<i>DeCoteau v. District County Court</i> , 420 U.S. 423 (1975)	34-35
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	passim
<i>Kennerly v. District Court</i> , 400 U.S. 423 (1971)	35
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	34
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	9, 26
<i>McClanahan v. Ariz. Tax Comm.</i> , 411 U.S. 164 (1973)	passim
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463	5, 7, 22, 37
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	16, 24
<i>Oklahoma Tax Commission v. Potawatomi Tribe</i> , — U.S. —, 111 S.Ct. 905 (1991)	37
<i>Oklahoma Tax Commission v. United States</i> , 319 U.S. 598 (1943)	7, 35-36, 37
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	10-11, 37
<i>Roff v. Burney</i> , 168 U.S. 218 (1897)	31
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 1670 (1978)	9, 31
<i>Squire v. Capoean</i> , 351 U.S. 1 (1956)	26, 36, 37
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	34
<i>United States v. McGowan</i> , 302 U.S. 535 (1938)	8
<i>U.S. v. Wheeler</i> , 435 U.S. 313 (1978)	9
<i>U.S. v. Wong Kim Ark</i> , 169 U.S. 649 (1898)	15
<i>Washington v. Confederated Bands and Tribes of the Yakima Indian Nation</i> , 439 U.S. 463 (1979)	25

TABLE OF AUTHORITIES—Continued

	Page
<i>Washington v. Confederated Tribes of Colville</i> , 447 U.S. 134 (1980)	37
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	10, 35
UNITED STATES CONSTITUTION:	
U.S. Constitution, Article I, Section 8, Clause 3	8
U.S. Constitution, Article VI, Clause 2	8
UNITED STATES TREATIES, STATUTES, AND REGULATIONS:	
Nez Perce Treaty (14 Stat. 647)	19
U.S. Treaty with the Yakimas (12 Stat. 951)	3
18 U.S.C. 1151	32-33, 34-35
General Allotment Act of 1887, 25 U.S.C. 331, <i>et</i> <i>seq.</i>	4, 6, 11
25 U.S.C. 331	11-12, 33
25 U.S.C. 348	12, 33
25 U.S.C. 349	<i>passim</i>
Indian Reorganization Act of 1934, 25 U.S.C. 461, <i>et seq.</i>	<i>passim</i>
25 U.S.C. 461	14
25 U.S.C. 462	14
25 U.S.C. 465	14, 17, 26
25 U.S.C. 608, 608(c) (Act of August 31, 1964; P.L. 88-540, Sec. 1, 78 Stat. 747)	17
Indian Land Consolidation Act of 1983, 25 U.S.C. 2201, <i>et seq.</i>	17-19
28 U.S.C. 1360	21
25 C.F.R. 151.10(e)	20-21
WASHINGTON STATE STATUTES:	
RCW 82.45.070	36
RCW 82.45.080	36

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:	Page
50 I.D. 691 (Dec. 24, 1924)	19
51 I.D. 133 (June 30, 1930)	19
Cohens Handbook of Fed. Indian Law, 1942 ed.	15
Rutgers Law Review, Vol. IX	15
Brief of United States for Petitioner, Supreme Court Docket No. 55-134	19-20
Brief of United States for Petitioner, Supreme Court Docket No. 78-1756	19, 20

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-408 and 90-577
Consolidated

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
v. *Petitioners,*

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
Respondent,

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION
v. *Cross-Petitioner,*

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

**On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF PETITIONERS/CROSS-RESPONDENTS,
COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER**

OPINIONS BELOW

The amended opinion and judgment of the Court of Appeals for the Ninth Circuit is reported at 903 F.2d

1207, (1990) and is reprinted in the Appendix to the County's Petition for Writ of Certiorari (Cert. Pet. #90-408 at pp. 1a-30a).

The opinion of the United States District Court for the Eastern District of Washington was not published. It is reproduced in the Appendix to the County's Petition for Writ of Certiorari (Cert. Pet. #90-408 at pp. 34a-39a). The District Court's Judgment is reprinted in the same Appendix at pp. 32a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The first opinion of the Court of Appeals was issued on January 9, 1990. On January 25, 1990, the Appellants Yakima County and Yakima County Treasurer (Petitioners/Cross-Respondents herein) filed Petition for Rehearing with the Court of Appeals. On February 21, 1990, the Appellee Confederated Tribes (Respondent/Cross-Petitioner herein) filed Petition for Rehearing with the Court of Appeals.

On May 16, 1990, the Court of Appeals issued its Amended Opinion and Judgment, the amendment relating to matter not directly addressed in the Rehearing Petitions and without disposing of the Rehearing Petitions.

On June 7, 1990, the Court of Appeals entered its Order Denying both the Petitions for Rehearing.

The Petition for Writ of Certiorari (#90-408) of the Petitioners/Cross-Respondents Yakima County and the Yakima County Treasurer was filed in this Court on September 5, 1990. The Cross-Petition for Writ of Certiorari (#90-577) of the Respondent/Cross-Petitioner, Confederated Tribes and Bands of the Yakim Indian Nation, was filed in this Court on October 3, 1990.

STATUTE INVOLVED

This case involves Section 6 of the Act of February 9, 1887 (24 Stat. 390), as amended by the Act of May 8, 1906 (34 Stat. 182), now codified as 25 U.S.C. 349, which reads as follows:

349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act, shall not extend to any Indians in the former Indian Territory.

STATEMENT OF THE CASE

The Yakima Indian Reservation was established by the Treaty with the Yakimas in 1855. (12 Stat. 951) The Reservation encompasses approximately 1.3 million acres in southeastern Washington State, almost all in Yakima County. (Appendix to Cert. Pet. #90-408, p. 6a) On February 8, 1887, Congress passed the Indian General

Allotment Act, also known as the Dawes Act, but referred to hereinafter simply as the Allotment Act. The Allotment Act authorized the Secretary of Interior to allot parcels of Reservation land to individual Indians, in trust, for a period of 25 years. Following the trust period the allottee could be granted a patent to the allotted land in fee with all restrictions on alienation removed, which then made the allottee subject to the general laws of the state with respect to the land. (25 U.S.C. 349, Clause 1) By the Act of May 8, 1906, also known as the Burke Act, the Allotment Act was amended to permit the Secretary to shorten or waive the 25-year allotment trust period and proceed directly to issue fee patents.

Under the authority of the Allotment Act there has been extensive allotment and patenting of lands from within the Yakima Reservation to individual Yakima Indians. As noted by this Court in the recent case of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989), involving the same reservation and principal litigants as this case, fee patented lands from within the Yakima Reservation now comprise about 20% (or roughly a quarter million acres) of the total. The fee lands are scattered throughout the Reservation area in checkerboard fashion, with substantial clusters in three incorporated towns. (J.A. p. 43; 109 S.Ct. at 3000). Some of the fee lands are still owned by Yakima Indians or have been reacquired, by individual members or the Tribe, from intervening owners.

For decades, prior to this lawsuit, Yakima County imposed the Washington general property tax on the fee lands inside the Reservation, whether owned by the Yakima Tribe or its members or (as most of the fee lands now are), by non-Indians. (Affidavit of Ralph Huck; J.A. pp. 29-30) Likewise, prior to this lawsuit, Yakima County imposed and collected real estate excise tax on the sale of those lands which were themselves taxed. (Affidavit of Nancy Davidson; J.A. pp. 27-28).

In 1987, Yakima County commenced its annual, general tax foreclosure proceeding in state court against those real properties throughout the County with 3-year-past-due taxes, including several properties owned in fee by the Yakima Tribe or individual Yakima members. (Complaint of Confederated Tribes, J.A. pp. 2-7; Answer of Yakima County, J.A. pp. 31-35). Thereafter on November 9, 1987, the Yakima Tribe, for itself and its members, brought this action in the District Court seeking injunctions against; 1) the foreclosure sale of those tribal-owned and member-owned fee properties within the Reservation; 2) continued imposition of the ad valorem taxes on these lands; and 3) collection of state excise tax on sales of these properties by the Tribe or its members. (*Id.*) The Tribe's substantial theory was that the Congressional authorization for state taxation of Indian fee lands, found in 25 U.S.C. 349, was no longer the law, in view of this Court's decision in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Following an agreed order temporarily restraining the foreclosure sales of the Indian properties, the case came before the District Court on cross-motions for summary judgment. (J.A. pp. 17, 25-26) The District Court granted summary judgment to the Tribe, accepting the Tribe's theory that, according to *Moe*, the authority for state taxation contained in 25 U.S.C. 349 had been effectively made void. (Appendix to cert. Pet. #90-408, pp. 34a-39a)

On January, 1990, the Ninth Circuit Court of Appeals, in a generally well-reasoned opinion, reversed the District Court, holding that 25 U.S.C. still provides authority for state taxation of Indian-owned fee lands inside the boundaries of the Reservation. However, based on the checkerboard pattern of land ownership within the Reservation and on a passage concerning tribal zoning rights from Justice White's plurality opinion in the recent case of *Brendale v. Confederated Tribes*, 109 S.Ct., 2994 (1989) at pg. 3008, it remanded the case for trial on what it called "the Brendale test" (i.e. whether the

taxes would seriously impact and imperial the political integrity, economic security, health or welfare of the Tribe). (*Id.* at pp. 1a-30a) Both parties filed timely petitions for rehearing. (Court of Appeals Docket No.'s 22 and 23) The Tribe's petition also requested rehearing en banc. (*Id.*) Thereafter, not having previously participated in the case, the United States filed an amicus curiae brief in support of the Tribe's rehearing petition and en banc request. (*Id.* Docket Nos. 24 and 27) While the rehearing petitions were pending, the Court of Appeals amended its previous opinion as to the excise tax issue, ruling that real estate excise taxes are not within the scope of Sec. 349. (*Id.* Docket Nos. 33 and 34) The cross-petitions for rehearing were denied by Order entered on June 7, 1990. (*Id.* Docket No. 36)

SUMMARY OF ARGUMENT

Congress, pursuant to its plenary power over Indian Commerce, adopted the General Allotment Act of 1887 to permit the allotment in trust of tribal lands to individual tribe members.

The Act provided for the issuance, after a period of trust protection, of an unrestricted fee patent for the land to the member, and that the member then became subject to general state laws. In 1906, it was held by this Court that those general laws included property tax laws vis-a-vis the land. (*Goudy v. Meath*, 203 U.S. 146)

The same year, while *Goudy* was pending, Congress amended the statute to permit the shortening of the trust period and providing that, upon the issuance of the fee patent, "all restrictions as to the sale, encumbrance or taxation of said land shall be removed." (25 U.S.C. 349)

After several decades of allotments and patents, Congress changed its policy regarding reservations and tribes and stopped the allotments and patents with the Indian Reorganization Act of 1934. The IRA, however,

can easily be reconciled with the tax provision of the Allotment Act so as to give effect to both, and neither the Allotment Act nor 25 U.S.C. 349 has ever been repealed.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) represents this Court's refusal, in light of the aforementioned policy change, to grant general tax authority over all reservation Indians' property and activities, regardless of their connection to trust or fee lands. It should not be considered (as contended by the Tribe below and as ruled by the District Court) a declaration of the implied repeal of state taxing authority under 25 U.S.C. 349. This conclusion is supported by other applicable cases, executive pronouncements, and modern statutes, especially a 1964 amendment to the Yakima Nation land acquisition statute of 1955. This 1964 statute, clearly recognized the taxability of reservation Indian fee lands.

The Court of Appeals decision, that the state's power to tax under 349 was limited by *Brendale v. Confederated Tribes*, is not supported by a proper reading of *Brendale* nor by good policy. Applying the "Brendale test" to this tax question, would engender the kind of confusion which was, according to the same opinion, to be avoided. Instead, applicable legal principals as well as good policy call for a decision based on the language used by Congress in 25 U.S.C. 349.

The real estate excise tax of the County herein, in light of *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), should be considered one of the taxes the restrictions as to which are removed by the issuance of a fee patent to a particular parcel of land. Like the property tax it should be upheld, at least as to sales of land to non-Indians.

ARGUMENT

1. Congress has the power to authorize these taxes.

Congress has plenary power over Indian affairs. This power flows from the United States Constitution, Art. I, Sec. 8(3) and the Supremacy Clause of Article VI.

This power has been long and consistently recognized by this Court.¹ Exercise of this power overrides prior conflicting acts or treaties. As stated in the *Cherokee Tobacco*, *supra* at p. 621:

The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubts as to its proper solution. A treaty may supersede a prior act of Congress (citation omitted) and an act of Congress may supersede a prior treaty. (citation omitted)

In *United States v. McGowan*, 302 U.S. 535 (1938) the status of the lands in the Reno Indian Colony as "Indian country" for purposes of Indian liquor prosecutions and the power of Congress as to the establishment and maintenance of the Colony were examined. Justice Black, for the Court, explained that in such a jurisdictional inquiry, two factors were important: legislative history and traditional U.S. policy on the subject (in this case Indian liquor regulation). (302 U.S. 536) Based on the apparent congressional purpose of protecting the Indians in the colony, the superintendence of the Colony for that purpose, and the tradition of extensive Indian liquor regulation by the United States the Colony was held to be "Indian country" for purposes of the criminal prosecution. More importantly, the Court observed:

¹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Cherokee Tobacco v. United States*, 78 U.S. (11 Wall) 616 (1871); *Head Money Cases*, 112 U.S. 580 (1884); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Sandoval*, 231 U.S. 28 (1913); *Williams v. Lee*, 358 U.S. 217 (1959); *U.S. v. Wheeler*, 435 U.S. 313 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 1670 (1978).

Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out . . .

302 U.S. at 536.

More recently, in *Santa Clara Pueblo v. Martinez*, *supra*, the principle was explained in the civil context:

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. (citations omitted) This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.

436 U.S. at 48. Accord, *U.S. v. Wheeler*, 435 U.S. 313, 323.

While true to the principle of plenary Congressional power over Indian commerce, a series of modern decisions, beginning with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Ariz. Tax Comm.*, 411 U.S. 164 (1973), testing the powers of states to tax Indians as to their reservation activities and property, have given a negative formulation to the same rule. According to this later formulation, states can *not* tax Indians, their reservation activities and property, *without* the authorization of Congress.

Justice White, writing for a divided court in *Mescalero* put it this way:

[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible without congressional content.

411 U.S. at 148.

Justice Marshall writing for a unanimous court in *McClanahan* gave a slightly more flexible formulation, describing the new trend as one of pre-emption.²

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (citing *Mescalero*) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. (citations omitted)

411 U.S. at 172. Justice Marshall went on to say that the relevant treaties and statutes are to be read against the "backdrop" of Indian sovereignty. But against this "backdrop" it is still the applicable treaties and statutes which define the limits of state power.

The existence of a sphere of tribal sovereignty had earlier been recognized. See, e.g., *Williams v. Lee*, 358 U.S. 217, 223 (1959). The contribution of *McClanahan* was to position this sovereignty as a background reference for the analysis of all cases such as the present one where state taxing authority over tribal Indians, their reservation activities and property are at issue.

The problem of how to identify and weigh the *McClanahan* tribal sovereignty element in a pre-emption case was treated in *Rice v. Rehner*, 463 U.S. 713 (1983).

When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some

² By this time (1973) the doctrine of federal pre-emption was already well developed and had been employed to resolve a question of state taxes on a licensed Indian trader several years earlier, based on the extensive federal regulation of the subject. *Warren Trading Post v. Ariz. Tax Comm.*, 380 U.S. 685 (1965). Reservation Indian land tenure and taxation had also been the subject of much federal legislation, so pre-emption was a natural way to approach this and other similar cases which followed it. It was less suitable for *Mescalero* inasmuch as the subjects of taxation in that case were off the reservation.

respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect "except where Congress has expressly provided that state laws shall apply." (citations omitted) Repeal by implication of an established tradition of immunity or self-governance is disfavored. (citation) If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. (citations omitted)

463 U.S. at 719-720.

In this case (1) there is no established tradition of Indian immunity from taxes on their reservation fee lands; indeed, the long-established tradition is that these lands are taxable; (2) the applicable acts of Congress contain unmistakable authorization for taxing these lands; far from withdrawing or repealing that authorization, Congress consistently acknowledged it in the intervening years; (3) there is no genuine ambiguity in the applicable statutes as they relate to Yakima County's taxes on Indian-owned reservation fee lands and the sale thereof.

The established tradition as to taxation of fee lands within the reservation grows directly out of 25 U.S.C. 349 and the other statutes made with reference to it. Therefore, before discussing the tradition, we will first turn to examine the applicable acts of Congress bearing directly or indirectly on the challenged Washington taxes.

2. Congress has authorized the taxation of the lands involved in this case. That authority has not been withdrawn and subsequent acts of Congress are consistent with such taxation.

The General Allotment Act of 1887, 24 Stat. 388, c. 119, Act of Feb. 8, 1887, is now embodied in 25 U.S.C. 331 *et seq.* Section 1 of the Act (now 25 U.S.C. 331) provides for Presidential allotments of reservations lands to in-

dividual Indians. Section 5 of the original Act (now 25 U.S.C. 348) provided for an initial trust allotment of 25 years duration (the period being extendable by the President) after which the trust was to be terminated and the land patented to the allottee in fee. 25 U.S.C. 348 reads, in pertinent part:

Upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or, in case of his decease, to his heirs . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. . . .

Section 6 of the original 1887 Act, now embodied in 25 U.S.C. 349, defined the consequences for the allottee of the issuance of the *fee* patent, in place of the original *trust* patent. The pertinent portion of the original Section 6 is still a part of the statute and reads as follows:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . .

Act of Feb. 8, 1887, c. 119, Sec. 6, 24 Stat. 390. It was against this statutory background that the case of *Goudy v. Meath*, 203 U.S. 146 (1906), arose.

The issue of *Goudy* was whether the civil laws to which James Goudy, was subject, as an Indian patent grantee, included the Washington real property tax laws. The answer of this Court was yes. Earlier in 1906, shortly before the *Goudy* case was decided, Congress amended Section 6 of the 1887 Act, adding, among other language, this proviso:

Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, *when-ever* he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a *patent in fee simple*, and thereafter all *restrictions as to sale, encumbrance, or taxation of said land shall be removed* . . .

34 Stat. 182, Act of May 8, 1906, c. 2348 (emphasis added). This proviso had two substantive effects: one was to allow the 25 year trust allotment period of Section 5 to be shortened or dispensed with completely; the other was to make plain what was only implicit in the 1887 version of Section 6, that issuance of the fee patent to an Indian land allottee subjected the land to state taxation. Thus Congress cleared up this issue for all cases arising after 1906, and, for the interim, provided guidance for the Court in its resolution of the *Goudy* issue.

A full understanding of the present case and the District Court's decision herein also requires a close look at the Indian Reorganization Act of 1934, June 18, 1934, c. 576, 48 Stat. 984. This Act has been cited as "inconsistent" with the General Allotment Act, but more importantly it was cited in the decision of the Supreme Court in *Moe*, 425 at 463, 479, which was the ultimate authority relied on by the District Court. (Appendix to Cert. Pet. #90-408, pp. 34a-39a).

The Indian Reorganization Act (IRA) halted the break-up of the reservation, by allotment, which had been occur-

ring under the Allotment Act, provided for replacement of lost tribal lands and for reorganization of tribal governments, elections,³ and the like. Sections 1, 2 and 5 of the Act deserve mention. Sec. 1 (25 U.S.C. 461) put an end to the issuance of individual fee patents and Sec. 2 (now 25 U.S.C. 462) indefinitely extended the trust restrictions on lands already allotted but still in trust (*i.e.*, whose trust period had not expired) as of June 18, 1934. Section 5 (25 U.S.C. 465) authorizes the Secretary of Interior to re-acquire reservation lands and to acquire off-reservation lands for the Indians, and provides that those lands acquired under the provisions of this Act shall be exempt from state and local taxation. The pertinent portions of 25 U.S.C. 465 are:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians. . . Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust . . . , and such lands or rights shall be exempt from State and local taxation. 48 Stat. 985, c. 576, Section 5. (emphasis added; *infra*, App. p. 1a)

It is clear from the foregoing passage that lands acquired under authority of the Reorganization Act of 1934 by the United States (in trust) for Indians would become, by virtue of such acquisition, exempt from the kind of taxes at issue in our present case. However, it is also clear that any lands otherwise subject to state taxation (*i.e.*, those previously patented to Indians in fee and

³ Section 18 (25 U.S.C. 478 contains a provision for elections for the acceptance or rejection of tribal coverage under the Act. Due to rejection of IRA coverage by some tribes, executive orders were used for a time to extend the trust status of allotments on some reservations. See 25 C.F.R. Ch. I, Appendix Subchapter 0 (94-1-90 Ed.) at p. 746 *et seq.*

therefore taxable under Section 6 of the Allotment Act) and not re-acquired by the U.S. for Indians according to the new 1934 Act, would by implication, *remain* taxable. By providing state tax exemption for re-acquired fee lands, on an *acquisition-by-acquisition* basis, Congress revealed its own understanding that, absent re-acquisition of these lands, they remain taxable. This is quite contrary to the view of the Tribe and the District Court that the Reorganization Act impliedly repealed the state property tax provision (Section 6) of the Allotment Act. On the contrary, this treatment of state property tax liability in the Reorganization Act is perfectly harmonious with the Allotment Act's treatment of the same subject.

This analysis is consistent with the rule that statutes are to be interpreted with regard to their historical and legal context. *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898). 25 U.S.C. 349 has as its salient historical and legal context, the case of *Goudy v. Meath*, *supra*. The context of the Indian Reorganization Act of 1934 includes 25 U.S.C. 349, the many Indian fee patents which had already been granted by 1934, and the consequent incorporation of reservation fee lands into the state and county tax base.

One of the drafters of the IRA of 1934 was Felix S. Cohen. Rutgers Law Revision, Vol. IX, pp. 345 *et seq.* Cohen was appointed to head the Indian Law Survey of the Department of Justice in 1939. *Id.* He wrote the Handbook of Federal Indian Law, published in 1942. *Id.* In Chapter 13, Sec. 3.B, of the Handbook he addresses the property tax question involved in this case, together with that of "forced fee patents" (discussed in the Brief of Amicus Curiae LaPlata County, et al., herein, at pp. 9-21). Cohen says:

Therefore, it would appear that the allottee under the General Allotment Act obtains a vested right to tax exemption which cannot be taken from him without his consent. Should he, on the other hand, apply for the issuance of a fee patent and be accorded one pur-

suant to law, there seems no reason to believe that his lands would not thereby become subject to state taxation. (footnotes omitted)

Cohen 1st ed. p. 259.

This case does not involve the forced, or non-consensual patents referred to in this passage.⁴ Rather, it involves only those lands as Cohen describes as "subject to state taxation", a mere eight years after his own work on the Act itself.

In sum then, the keys to exemption from state property tax on any reservation Indian land, as based on the Reorganization Act, are: (1) property was *continued in trust* status, by virtue of the Act, or (2) the property has been *re-acquired in trust* under the authority of the Act. The lands involved in this case are in neither category.

In enacting the IRA, Congress clearly abandoned the assimilation policy which had been the basis for the Allotment Act of 1887 and its 1906 amendment. But the effect of the IRA was not to erase at one stroke the tax effects of 47 years of allotment history. Rather, it was to preserve the 1934 status quo and allow for step-by-step restoration of the tax exempt tribal land base. The IRA and 25 U.S.C. 465 implicitly recognize the continued taxability of reservation Indian fee lands, so long as they remain in unrestricted status, and the statutes do not conflict on this point. In the Indian law jurisprudence of this Court, the implied repeal of statutes is not favored. *Morton v. Mancari*, 417 U.S. 535 (1974).

If, as the District Court believed, the tax exemption of all reservation Indian lands is restored by force of the

⁴ None are alleged in the record, and in any event, the relief provided by Congress from a forced fee patent, not accepted by the grantee, is tender to the Secretary of Interior, for cancellation, within the applicable trust period (25 U.S.C. 352a) and application thereto for reimbursement of any tax payments made in the interim (25 U.S.C. 352c).

IRA generally and its repudiation of the old policy, then the specific tax exemption *language* of Sec. 465 is without effect. By the same logic, the termination acts, by which many Indian reservations were dissolved in the 1950's,⁵ could be deemed to have been repealed and the reservations restored by operation of the Indian Land Consolidation Act, which was based on the same Indian land consolidation policy as the IRA and indeed which incorporated the IRA's *mechanism* (25 U.S.C. 465), by specific reference,⁶ for this purpose. (Act of January 12, 1983, 25 U.S.C. 2201, *et seq.*)

Of particular relevance to this case is the Act of August 31, 1964, PL 88-540, § 1, 78 Stat. 747, which amended the Act of July 28, 1955 (25 U.S.C. 608), governing purchases of land for the Yakimas. The 1955 Act, PL — -188, was one of several during the 1950's which, in apparent response to the tribal elections which left many tribes out of IRA coverage,⁷ authorized the Interior Secretary to re-acquire for the Yakima's, from within the Reservation, lands previously allotted to members and still in trust or restricted status. It also authorized sale of tribally owned trust lands to members and in kind exchanges of land.

The 1964 amendment incorporated the 1955 statement of purpose⁸ and authorized the purchase of *fee* lands or

⁵ See e.g., Menominee Termination Act of June 17, 1954, 68 Stat. 250, P.L. 83-399; Klamath Termination Act of August 13, 1954, P.L. 83-587.

⁶ The ILCA, P.L. 97-459, Title II, § 202, 96 Stat. 2517 (now 25 U.S.C. 2202) brings some tribes, who earlier rejected coverage of IRA in tribal elections, under the IRA's Sec. 5, the land reacquisition provision.

⁷ Cohens Handbook of Federal Indian Law, 1982 ed. Ch. 11, Sec. B1, p. 614, n.19.

⁸ For the purpose of effecting consolidations of land, situated within the Yakima Indian Reservation in the State of Washington,

restricted lands for the Tribe, from anywhere in the area ceded by the Tribe to the United States, Sec. (a) (1) (25 U.S.C. 608(a) (1)). Section (c) of the Act (codified as 25 U.S.C. 608(c)), addressed the tax status of the lands acquired for the Yakimas as follows:

“(c) In all cases in which the Secretary is acquiring for the Yakima Tribes lands or interests in *lands presently held in trust* or under restrictions for the benefit of an individual Indian, title shall *be taken* in the name of the United States in *trust* for the Yakima Tribes. In all cases in which *land* being purchased is *presently held* by the grantor *in fee simple*, title shall *be taken* for and held by the Yakima Tribes *in fee* and such land shall *not*, by reason of its being owned by the tribes, *be exempt from taxation* in accordance with the laws of the State of Washington. (emphasis added)

What is abundantly clear from this passage is that (1) the tax status of these lands follows their alienability (fee lands are taxable—trust lands are not) and (2) the Yakima legislation was not to be used to return fee lands to trust status. The first point is merely a recognition of the state of the law, regarding taxation of reservation Indian lands, as of 1964. The second point was changed by the Acts of November 1, 1988, PL 100-581, § 213, 102 Stat. 2941 and May 24, 1990, PL 101-301, § 1(a) (3), 104 Stat. 206, so that now any lands acquired for the Yakimas under Sec. 608 or 465 *must* be acquired in trust. This has the effect of restoring tax exemptions to new acquisitions, one by one,⁹ in accord with the principal estab-

between the Yakima Tribes of Indians and individual members of the tribes and other Indians, for the mutual benefit of the tribes and the individual members thereof, the Secretary of the Interior is authorized in his discretion to—

⁹ Indeed this is the inferable purpose of the legislation, the 1964 Act having been brought sharply to the attention of the Tribe with the briefs of the County to the District Court in April, 1988 (Dist. Ct. Docket Nos. 20 and 25).

lished by Congress, that fee liens are taxable, while trust lands are not.

3. The United States has repeatedly affirmed the view that reservation Indian fee lands, such as those involved in this case, are taxable.

This principle was frequently supported in the actions and pronouncements of the United States Interior Department, and attorneys advising and representing the Government from 1924 until 1980. By opinion of December 24, 1924, Solicitor Edwards interpreted the 1906 amendment to Sec. 6 (the First Proviso of 25 U.S.C. 349) to mean that upon the issuance of a voluntary fee patent to an Indian of the Colville Reservation, *before* the expiration of the original 25-year period of the trust patent, the property became subject to state taxation. 50 I.D. 691. Solicitor Finney, by opinion of June 30, 1930, interpreted Section 6 in the case of a fee patent issued *after* the passage of the full 25 years, as provided for in the original 1887 Act, and against the contention that the “permanent home” and “perpetual use” language of the Nez Perce Treaty (14 Stat. 647) carried with it a tax exemption which survived the patent. The Solicitor concluded that the fee lands were taxable. 51 I.D. 133.

The Brief of the United States for Petitioner in *Squire v. Capoeman*, S.Ct. #55-134 at p. 13, n.4, and the Brief of the United States in *U.S. v. Mitchell*, S.Ct. #78-1756 at pp. 23-24, both support the position of the County in this case. In the Brief of the United States as Petitioner in *Squire v. Capoeman*, Supreme Court No. 55-134, the Solicitor discussed the effect of 25 U.S.C. 349 as viewed by the United States:

Although not relied on by the courts below, it may be pointed out that Section 6 of the General Allotment Act, as amended by the Act of May 8, 1906 (App. pp. 42-43), empowered the Secretary of the Interior, in certain circumstances, to issue a fee

patient to competent allottees and provided that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." Since it had never been the policy of the United States to levy direct taxes on lands because of the constitutional requirement of apportionment, this provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation.

In the Brief of the United States, as Petitioner, in *United States v. Mitchell*, Supreme Court No. 78-1756, the Solicitor discussed the purpose and effect for the holding in trust of Indian lands allotted under the General Allotment Act:

The General Allotment Act thus did not, as the Court of Claims implicitly concluded, anticipate the United States would undertake broad management responsibilities as a statutory trustee for the allotted lands. The allottees were expected to occupy and manage the land, enjoying all its use in agricultural and grazing activities. The United States undertook to "hold the land * * * in trust" not with the objective of overriding or controlling the Indians' right to exclusive use and possession of the land, but instead for the limited purposes of (a) restraining improvement alienation of the land by the allottees and (b) affording an *immunity from state taxation for the period during which legal title remained in the United States*. 13 Cong. Rec. 3211 (1882) (Senator Dawes). (Brief of Petitioner at p. 24.) (emphasis added; footnote omitted)

From the Brief of the United States as Amicus Curiae supporting certiorari in these cases, it appears the position of the Government on this issue has undergone a recent change, one which Yakima County believes is unwarranted.

Finally 25 C.F.R. 151.10(e), adopted in 1980, requires certain factors to be weighed by the Interior Depart-

ment before Indian fee lands are taken into trust status, including the tax effects on local governments. Unless the fee lands are taxable, such trust taking would have no tax effects on local government.

4. The decision of this Court in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) is not inconsistent with the tax authority asserted by Yakima County in this case.

In 1976, the Court decided two significant state tax cases under the Mescalero/McClanahan standard. The issue in *Bryan v. Itasca County*, 426 U.S. 373 was whether 28 U.S.C. 1360 subjected to Minnesota property taxes the mobile home of an enrolled Chippewa Indian situated on trust land in the Chippewa Reservation. 28 U.S.C. 1360, was enacted August 15, 1953 as a part of what is popularly known as Public Law 280 (67 Stat. 589). Section 4 of the Act, the portion at issue in *Bryan*, gave Minnesota "jurisdiction over civil causes of action involving reservation Indians and arising in Indian country" (defined in the statute so as to include the Chippewa Reservation); and it applied to such Indians and their property "those civil laws . . . that are of general application to private persons or private property". The Court, in deciding against the taxing authority, interpreted the statute as only a grant of jurisdiction to hear and decide, in state court, lawsuits involving reservation Indians. This conclusion was based on the context and legislative history of PL-280 and the long-standing canon of construction taken from Indian treaty law, that ambiguities in Indian statutes are resolved in favor of Indians (citing *McClanahan*) because:

"Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax]¹⁰ immunity and allow states to treat Indians as part of the general community." (citation omitted)

426 U.S. at 392.

¹⁰ Bracketed passage in original.

The other 1976 case, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, followed the approach of *McClanahan* in holding that the State of Montana lacked taxing authority over the cigarette sales and personal property of reservation Indians, despite the clause of 25 U.S.C. 349 (Act of Feb. 8, 1987, ch. 119, Sec. 6, 24 Stat. 390), which subjects Indian allottees to the civil laws of the state, generally.

The issue in *Moe* most relevant to this case is whether 25 U.S.C. 349 authorized the State of Montana to tax the motor vehicle of an Indian merely because the Indian *resided* within the reservation. The State of Montana did not distinguish between Indians residing on fee land and those residing on trust land but did rely on 25 U.S.C. 349, apparently taking the view that since considerable reservation lands had been patented in fee, that the property of all reservation residents was subject to taxation. Since real property taxes were not involved, the proviso relied on by the County here was not referred to.¹¹ In effect, Montana asked the Court to extend Sec. 349 beyond its terms and beyond the rule of *Goudy* in furtherance of the assimilation policy, already since repudiated with the IRA in 1934. The Court, reasonably enough, concluded that the statute's grant of general civil jurisdiction over a fee patentee did not include power to tax the personal property of an Indian who may or

¹¹ Since Montana did not limit its asserted taxes to sales by or property of Indian patentees under 349, or their successors, even the connection with the first clause of Sec. 349 was a tenuous one. In general, Montana's position was that since some reservation Indians were subject to Montana laws and some reservation Indian property was taxable, all reservation Indians and all their property should be so. Indeed, the main argument of Montana in the case was one of equal protection. See briefs of Montana in Supreme Court #74-1656/75-50, generally. It is significant that the Court excerpted this part of Sec. 349 in its opinion at 425 U.S. 477 and omitted any reference to the proviso relied on by Yakima County in this case.

may not have been even a successor in interest to any patentee. Thus the holding in *Moe* did not represent the repeal or nullification of Sec. 349 and its authorization to tax. Rather it is a sensible refusal to go beyond its plain terms, in view of the change in federal policy which occurred after the enactment of the statute.

Despite the factual differences between *Moe* and the present case, an examination of the reasoning and principles of *Moe* may also shed light on the problem presented here. Let us then examine the grounds upon which the *Moe* decision was based. They were: Clear congressional consent for state taxation is required (*id.* at 476); the statute relied on does not clearly refer to personal property or sales taxes (*id.* at 477); the treaty and statutes used in resolving *McClanahan* and those relevant to *Moe* were "essentially the same" (*id.* at 477); there was no case authority for the extension of Section 6 to these particular taxes, while there was a body of complex jurisdictional statutes adopted after Section 6 which limited the reach of state law within reservations (*id.* at 479); the policy of assimilation, on which the Allotment Act was based, was repudiated by the adoption of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. 461, *et seq.* (*id.* at 479); the checkerboard pattern of mixed state/federal jurisdiction in reservations is impractical and undesirable and "eschew[ed]" by both the Congress and the Court (*id.* at 478); and the challenged Montana taxes conflict with the controlling federal statutes and therefore must give way under the Supremacy Clause (*id.* at 480-481, n.17).

None of these reasons should be a barrier to Yakima County's taxes in this case. Sec. 349 specifically refers to *taxation* of fee patented lands, and Congress' consent is unmistakable. The statutory context of this case is thus different from that of *McClanahan* where the applicable statute (the Buck Act) was neutral as to income taxes upon reservation Indians. There is clear case authority

for at least the property tax involved in this case. *Goudy v. Meath, supra*. The statutes adopted since 1887, at least as they relate to this case, are in harmony, not conflict, with the County's position. (pp. 13-19, *supra*). In particular, the IRA, though it reflected a change in congressional policy during the 1930's toward Indian tribes and reservations, recognized the status quo in regard to what we now call the "checkerboard pattern" and its tax aspects.

Implied repeal of statutes is disfavored in the law. In the absence of a clear, affirmative showing of an intention to repeal, the only permissible justification for implied repeal of one statute by another is that the two are irreconcilable. When two statutes are capable of co-existence, the courts must give effect to both unless Congress has clearly expressed a contrary intention. *Morton v. Mancari*, 417 U.S. 536 (1974); *Administrator of FAA v. Robertson*, 422 U.S. 255 (1975). The Allotment Act and its taxability-of-fee-lands rule (25 U.S.C. 349) are easily and properly reconciled with the Reorganization Act by allowing state taxation of those reservation lands patented in fee before 1934 (and not yet re-acquired according to IRA Sec. 5), by preserving the trust status (and consequent tax exemption) of reservation lands never patented in fee, and by restoring the trust status (and tax exemption) of those lands reacquired according to the terms of the Act by the United States for those Indians and tribes covered by the IRA.

Yakima County respectfully submits that there is no implied repeal of the power of states and counties to tax reservation Indians' fee lands. Moreover, such repeal, if found by this Court, would raise a set of other imponderable questions related to overlapping Indian and non-Indian interests created in the post-Allotment Act era. *E.g.*, lands owned by partnerships of Indians with non-Indians or by marital communities of mixed status, mortgagors, mortgagees, contract buyers, contract

sellers, holders of easements, etc. These problems need not and ought not be thrust on the County or the courts.

Since this Court's ambiguous 1976 reference to "checkerboard" jurisdiction in *Moe*, it has decided the case of *Washington v. Confederated Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979) in which the Yakima Nation had challenged the legality of Washington's assumption of fairly broad civil and criminal jurisdiction over Indian reservation lands in Chapter 36, 1963 Washington Laws (RCW 37.12). Just as the statutes authorizing the taxes at issue in this case, those at issue in *Washington v. Confederated Tribes* had a "checkerboard" effect because they resulted in state jurisdiction over matters on fee lands, but not over matters on trust lands. The Court, at 439 U.S. 501, disposed of the Tribe's argument against checkerboard jurisdiction, stating in pertinent part as follows:

"The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction. [citations] . . . The land-tenure classification made by the State is neither an irrational nor arbitrary means of identifying those areas within a reservation in which tribal members have the greatest interest in being free of state police power. Indeed, many of the rules developed in this Court's decisions in cases accommodating the sovereign rights of the tribes with those of the States are strikingly similar. [citations] In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution.

439 U.S. 502.

A more detailed analysis of *Moe* was done by the Court of Appeals and appears at Cert. Pet. #90-408 App. 15a-27a. Beyond that analysis the County will only urge this Court not to expand the narrow holding into this markedly different case.

5. Other relevant cases from this Court support the taxation of these reservation Indian fee lands.

Goudy v. Meath, 203 U.S. 146 (1906), holding that reservation Indian fee lands are properly subject to taxation under Sec. 6, has never been overruled by this Court. Indeed the observations and rulings of this Court in subsequent cases are consistent with and support this rule. *Squire v. Capoeman*, 351 U.S. 1, considered the question of whether the sale of timber from allotted reservation lands held in trust for a Quinault Indian could be taxed under Internal Revenue laws. The Court, per Chief Justice Warren, resolved the question by reference to 25 U.S.C. 349, reasoning that by subjecting allotted lands to taxation upon the issuance of the fee patent, Congress revealed its intent to shield the trust allotment (including timber harvested therefrom) from taxation until the termination of the trust. The Chief Justice made specific reference to the proviso of Sec. 349, saying:

The literal language of the proviso evinces a congressional intent to *subject* an Indian allotment to *all taxes only after* a patent in fee is issued to the allottee. This, in turn, implies that, *until* such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted. (emphasis added)

351 U.S. 7-8.

Mescalero Apache Tribe v. Jones, *supra*, involved the validity of the two state taxes, one being a use tax on ski lift equipment owned by the Tribe and permanently attached to trust land acquired by the United States for the Tribe under 25 U.S.C. 465 (IRA Sec. 5) but located off the Reservation. After observing that states generally have full authority over Indians *outside* the reservation (411 U.S. at 148), the Court nevertheless held the fixtures exempt from the state taxes based on their connection with the underlying trust land, because:

[U]se of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former. "Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements." *United States v. Rickert*, *supra*, 188 U.S. at 442, 23 S.Ct. at 482. (quotation marks in original)

411 U.S. 158-159. This supports the position of Yakima County that, under the Allotment Act *and* the IRA, it is the trust or fee character of the land title, rather than the on or off-reservation location, which determines the taxability of Indian-owned property.

6. The decision of this Court in *Brendale v. Confed. Tribes of Yakima*, 109 S.Ct. 2994 (1989), should not be taken as limiting or qualifying the state taxing authority of 25 U.S.C. 349.

In *Brendale v. Confed. Tribes of Yakima*, 109 S.Ct. 2994 (1989), was initially brought by Respondent/Cross-Petitioner Yakima Tribe against the Petitioners/Cross-Respondents Yakima County, *et al.*, to obtain a declaration of the Tribe's exclusive power as against the County to zone non-member-owned fee lands inside the Reservation boundaries. 109 S.Ct. at 3002. This Court was divided on the issue, with four Justices of the view that the power to zone these fee lands belonged to the County and not the Tribe, three Justices of the view that the Tribe had the exclusive power, and two Justices holding that the power to zone any particular parcel of property depended on the pattern and prevalence of fee or trust land status in that portion of the Reservation where the subject property was situated. 109 S.Ct. at 3015-3017. As a result the Tribe was held to have exclusive authority to zone in the large "closed area" of the Reservation where fee lands are very sparse, but the County to have the

power in the balance of the Reservation (the "open area") because of the large percentage of lands therein owned in fee by the non-members of the Tribe. 109 S.Ct. at 3016.

The White plurality view was that the issuance of each fee patent under the Allotment Act had thereby divested the Tribe of the power to zone that parcel and that therefore such lands were subject to county zoning. 109 S.Ct. 3003-3004. However, he went on to say that the County's power over these was not unlimited, where particular land uses would have demonstrably serious impacts which would imperil the political integrity, economic security or the health and welfare of the Tribe. 109 S.Ct. 3008. The political integrity, economic security, health and welfare of an Indian tribe, as such, is a general description of those matters recognized within the notion of tribal sovereignty. It is a federally protected interest of the tribe, enforceable by injunction, which, as Justice White says "the Supremacy Clause requires state and local governments, including Yakima County zoning authorities, to recognize and respect . . ." 109 S.Ct. 3008. However, as observed by Justice White, this tribal sovereignty is limited to matters of tribal self-government and internal affairs. Yakima County submits that taxation of fee lands within the Reservation is not such a matter, according to Justice White's *Brendale* analysis. As he says at 109 S.Ct. 3005-3006:

A tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's "external relations." *Wheeler, supra*, 435 U.S. at 326, 98 S.Ct. at 1087. Those cases in which the Court has found a tribe's sovereignty divested generally are those "involving the relations between an Indian tribe and nonmembers of the tribe." *Ibid*. For example, Indian tribes cannot freely alienate their lands to non-Indians. . . . (quotation marks in original; citations omitted) . . .

Alienation of tribal trust lands by the United States, alienation by individual patentees of their own lands, and liability of these lands to involuntary alienation through tax enforcement are very specifically addressed by Congress in 25 U.S.C. 348 and 349. Indeed, this case was brought because of the tax relations between Indians and non-member tax collectors, and to prevent such an involuntary alienation of 139 specific properties. Prayer of Tribes Complaint, J.A. p. 6; Fact Stipulation, para. 3, J.A. p. 37. It thus follows that Yakima County's challenged property taxes do not implicate tribal sovereignty nor give rise to any injunction remedy as set forth by Justice White, because they are "external", rather than "internal" matters.

The fundamental differences between zoning and taxation counsel against application of a "Brendale test" to a tax case. The essence of zoning is the prevention of uses with negative effects on nearby properties. It is thus preventive in nature and local in effect. Property taxation, by contrast, operates directly on the individual property owner, via his property, so as to finance governmental benefits which are not local but enjoyed throughout the taxing entity's jurisdiction. It is essentially remedial, rather than preventive, in nature and non-local in effect. Moreover, if state (or county) and tribal governments have inconsistent zoning schemes, each is destructive of the other. This was recognized implicitly by both the White plurality and the Blackmun minority in *Brendale*. Multiple and differing taxation schemes operating on the same property or activity, however, are common and are legally compatible, as recently recognized by this Court in *Cotton Petroleum v. New Mexico*, 109 S.Ct. 1698 (1989). Whatever logic there may be to judging county zoning according to its effect on a neighboring tribal property, there is no such logic to judging county taxes according to their indirect effect on the tribal body politic.

The White plurality opinion also counsels against case-specific tests for zoning authority which could result in

shifting, transitory powers, engendering uncertainty as to the incidents of land ownership to the detriment of both governments and private land owners. 109 S.Ct. at 3007-3008. Due to the many factual variables in the property tax equation, the "Brendale test" as conceived by the Court of Appeals would create just the kind of chaos which Justice White sought to avoid. Such a test for county tax authority would subject county revenue and budgeting, in reservation areas, to an ever-shifting analysis of numerous facts with taxation of these lands switching on or off like an electric light.

In no two cases will the consequences of taxing reservation lands be the same for the home tribe. Consider the many factors to be weighed, including: (1) The relative amounts of fee and trust lands within the reservation; (2) the relative amounts of tribal-owned and member-owned fee lands; (3) the rates of tax within the reservation; (4) frequency of tax defaults by tribe members; (5) availability of tribal tax assistance programs for members; (6) the extent to which the lands to be taxed, or their owners, generate income for the tribe; and (7) the extent to which the lands to be taxed are actually used for tribal purposes. Each of these factors will not only vary from place to place, but also over time, so that if the Court of Appeals decision in this case becomes the law, these same fact questions may have to be litigated every few years as to most if not all the Indian reservations still existing in the United States. If the judgment of the Court of Appeals on this point is allowed to stand, tribes and their members may or may not benefit. But we can be certain that the rights and burdens of land ownership in large portions of the American West will be thrown into doubt which can only be mitigated through complex and costly litigation, county-by-county, reservation-by-reservation and, year-by-year. The sensible alternative to these accumulating years of lawsuits is to give

25 U.S.C. 349 its plain and intended meaning unless and until it is repealed by Congress and to reject any attempt to cut back its effect with a "Brendale test."

Ironically, several of the above factors could be influenced if not controlled by the tribes to the detriment of tribal members and county government.¹²

It is worth noting here that tribal powers rightly include control over standards for membership. *Roff v. Burney*, 168 U.S. 218 (1897); *Santa Clara Pueblo v. Martinez*, 436 U.S. 72, n.32 (1978). There are many reasons why a tribe may wish to relax the blood-quantum standard or other criteria for membership.¹³ If tribal membership is held to create a blanket property tax exemption within reservation boundaries, internal tribal affairs could, especially in some counties, cause unpredictable disturbances in county tax revenues. Such a rule could create additional and undesirable political tension between county and tribal governments. Moreover, regardless of any change in membership standards or numbers within the reservation, if the tax exemption inheres

¹² For illustration, consider a tribe with ample corporate funds with which it carries on tribal welfare programs including loans to members which may be used to meet tax obligations. Such a thriving tribe should be practically unaffected by taxes on member-owned lands and thus, under the Circuit Court's reasoning would therefore itself be denied a tax exemption for its fee lands. If this same tribe depleted its available funds in the acquisition of fee lands within the reservation, cut back welfare and tax loan programs and stood by for the inevitable member defaults, the increasing relative impacts of state taxes on tribal welfare would likely result in valuable tax exemption for the tribe and those members still holding reservation lands, but at the expense of other tribal benefits, not to mention the general public purse.

¹³ The widely publicized 1990 census results included a marked increase in the number of persons identifying themselves as Indians, an apparent reflection of the increasingly high value placed on ethnicity in our society. It would not be unreasonable for a given tribe to lower its blood-quantum requirement from, e.g. 1/4 to 1/8 or from 1/8 to 1/16, in furtherance of a similar sociological value.

in the Indian owner (the Tribe's view), rather than the property (the County's view), the well-known tax planning device of sale-leaseback acquires a new dimension—as a device by which non-Indian property owners on the reservation can share the tax immunity of their Indian neighbors. Yakima County believes that reservation people should not be induced to collude in this way for the avoidance of taxes.

It is also important that, though for different reasons, the County and the Tribe in their Petitions for Certiorari and the United States as Amicus Curiae in its Brief to the Court supporting those petitions, are unanimous in the view that this case should not be decided under Justice White's "Brendale test".

7. The inclusion of reservation Indian fee land within "Indian country" for purposes of criminal jurisdiction or otherwise does not negate the taxability of the subject lands under Sec. 349.

18 U.S.C. 1151 reads:

§ 1151. Indian country defined

Except as otherwise provided in section 1154 and 1156 of this title [18 U.S.C. §§ 1154 and 1156], the term "Indian country", as used in this chapter [18 U.S.C. §§ 1151 *et seq.*], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of way running through the same.

(Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757; as amended by Act of May 24, 1949, ch. 139, § 25, 63 Stat. 94.)

It has been argued by the Tribe in this case that by defining "Indian Country" in 1151 to include reservation fee lands, Congress deprived the states and counties of the authority previously granted under Sec. 349 to tax these fee lands (if owned by Indians). After the rejection of this theory by the Court of Appeals (Appendix to Cert. Pet. #90-408, pp. 21a-22a, 24a). The United States, Amicus Curiae, in its Brief to this Court on certiorari refashioned it. The United States now argues (Brief, pp. 15-16, n. 10) that 1151 simply "changed the effect" of Sec. 349 so as to forbid state taxes on Indian fee lands inside, but not outside, the reservation boundaries; And that it does so by "codif[ying] the pre-emptive principal embodied in the "many and complex intervening jurisdictional statutes" enacted since the 1906 revision of Section 6 of the General Allotment Act, that are "directed at the reach the state and within reservation lands." *Moe*, 425 U.S. at 479 (footnote omitted)". This theory still does not withstand scrutiny.

Section 1 of the General Allotment Act (25 U.S.C. 331) provides the basic authority for the making of the allotments referred to in 25 U.S.C. 348 and 349. These allotments are of lands from inside the reservation. Sec. 331, the first sentence, reads:

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian.

It is too well established to require citation that the purpose of the Allotment Act was to dismantle *the reservations* to be then absorbed into the surrounding states and counties. For the United States now to argue that Sec. 349 should have two different applications, one outside and one inside the reservation, is disingenuous.

As noted by the Court of Appeals in this regard, 18 U.S.C. 1151 and its definition of "Indian country" are criminal provisions, and do not designed as such for application in a civil context. Sec. 1151 was inserted in the Indian portion of the United States Criminal Code as a part of a large scale criminal code revision in 1948 and its 1949 amendments. Act of June 25, 1948, Ch. 646, P.L. —-773; Act of May 24, 1949, Ch. 139, P.L. —-72. However, as the United States has asserted, this section and the term "Indian country" as used there have been resorted to for guidance in resolving some civil cases where the primary civil statute was not sufficiently specific. Therefore the cases cited by the United States for this theory may deserve mention.

In *Solem v. Barlett*, 465 U.S. 463 (1984), the issue was whether the 1908 opening of the Cheyenne River Sioux Reservation to non-Indian settlement had the effect of diminishing the size of the Reservation. Resort was had to § 1151 in answering this question because, as the Court explained, in adopting the 1908 settlement statute, Congress did not anticipate the question raised in the case and therefore failed to provide an answer to it. 465 U.S. 468.

Mattz v. Arnett, 412 U.S. 481 (1973) likewise involved the continued reservation status of another area which had been opened to non-Indian settlers by an act in which clear language of termination for the reservation could not be found. Section 1151 again provided a helpful reference which was used together with other collateral statutes 412 U.S. 505-506. *DeCoteau v. District County Court*, 420 U.S. 423 (1975) was another termination

case. The question was whether cession of a large portion of the reservation to the United States, followed by mesne transfer thereof to non-Indians, left the state with jurisdiction over acts occurring on these fee lands. The Court there held that the state did possess the questioned jurisdiction, based on the plain meaning of the applicable statute and its surrounding circumstances and legislative history. 420 U.S. 444-445.

McClanahan v. Ariz. Tax Comm., 411 U.S. 164, 177 (1973) was another case in which the statute (the Buck Act) which addressed the subject matter of the litigation (state income taxes on federal reservation residents) was *neutral* as to its application to reservation Indians. Again, the customary resort to Sec. 1151 as an analogous source.

Kennerly v. District Court, 400 U.S. 423 (1971), involved the issue of the effectiveness of a *tribal* grant of state jurisdiction (held ineffective), and neither Sec. 1151 nor the term "Indian country" was relied on. In *Williams v. Lee*, 358 U.S. 217, 220-222 (1959), the Court cited Sec. 1151 as illustrative of federal *criminal* jurisdiction principals 358 U.S. at 220.

In all these cases, either the Sec. 1151 definition of "Indian country" was not used to resolve the case, or it was used due to lack of sufficient detail for the Court's purposes in the primary statute on the subject. In 25 U.S.C. 349 we have *very* clear congressional assent to state taxation of fee lands, and resort to the criminal code for its definition of "Indian country" is simply not warranted. Indeed, to do so would be, in the language of *Rice v. Rehner*, 463 U.S. 733, to convert a canon of construction into a license for the disregard of congressional intent.

8. Relevant decisions of this Court support the application of excise taxes to the sale of otherwise taxable reservation Indian lands.

This Court has dealt at least twice with the issue of an excise tax on the transfer of Indian property. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943)

involved Oklahoma estate taxes on the transfer through probate of lands and other property. Some of the lands had been taxable in the hands of the decedent and some had been exempt. It was held that transfer of the lands which were taxable before the owners death was therefore subject to the estate tax, while transfer of the exempt lands was not.

Squire v. Capoeman, 351 U.S. 1 (1956) concerned capital gains tax on the sale of timber harvested from Indian trust land in the Quinault Reservation. The Court held that such sale was not taxable, but said with reference to Sec. 349:

The literal language of the proviso evinces a congressional intent to *subject* an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee. (emphasis added)

351 U.S. 7-8.

Though the tax was not upheld in *Squire*, this passage is a very plain endorsement for the application of Yakima County's state excise tax on the fee-patented lands involved in this case.

In addition to the personal obligation imposed by the Washington real estate excise statute on the seller, the sale of reality also creates a lien upon the property (82.45.070, Appendix, *infra*, p. 2a) which can then be enforced in the hands of the buyer. (RCW 82.45.080, Appendix, *infra*, p. 2a) If the Court determines that Yakima Indians cannot be required to pay the tax as called for in 82.45.080, the further question is presented whether the lien of 82.45.070 can properly be enforced in the hands of the buyer if the buyer is a non-Indian. The *Moe* case itself, in addition to the personal property tax discussed *supra*, involved the Montana tax on sales of cigarettes by reservation Indians from reservation smoke shops. It was held that the Indian sellers could lawfully be required to collect the sales tax on sales to

non-Indians because the burden of the tax fell on the non-Indian buyer. In *Washington v. Confed. Tribes of Colville*, 447 U.S. 134 (1980), the Court considered and upheld the authority of Washington to impose both a cigarette excise and general personal property tax on reservation sales of cigarettes by Indians to non-Indians. Recently, in *Oklahoma Tax Commission v. Potawatomi Tribe*, — U.S. —, 111 S.Ct. 905 (1991), the Court considered state sales tax on tribal sales of cigarettes from an off-reservation trust land location. In holding the sales to Indians were exempt and those to non-Indians were taxable, the Court followed *Moe* and *Colville* and rejected the argument, now made by the United States here, that the location of the subject being taxed (whether inside or outside a reservation) was determinative.

Yakima County submits that the applicable rules of *Oklahoma*, *Moe*, *Colville*, and *Potawatomi*, as well as the dicta in *Squire*, support the real estate excise tax at issue here, at least where the buyer is non-Indian.

9. A synthesis of applicable decisions of this Court affords a satisfactory test for state taxing power in this case.

A suitable approach to resolving the present case can be extracted from *McClanahan*, *Bryan*, *Rehner* and *Moe*: (1) determine whether there is a recognized tradition of Indian immunity from the challenged taxes (*Rehner*), (2) determine whether the applicable acts of Congress authorize the challenged taxes (*McClanahan*), and, where an established tradition of Indian immunity exists, whether the authorization is unmistakably clear (*McClanahan*, *Bryan*), (3) where genuinely ambiguities exist in the acts of Congress, resolve them in favor of the Indians, but without disregarding clear expressions of intent.¹⁴ (*Rehner*)

¹⁴ "We give this rule [resolving ambiguities in favor of Indians] the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define

CONCLUSION

Yakima County respectfully prays that this Court affirm the Court of Appeals as to county authority to tax the lands in this case and reverse the Court of Appeals as to the "Brendale test" qualification of such authority and as to authority to impose its real estate excise tax on sales of reservation Indian fee lands, at least those to non-Indian buyers.

Respectfully submitted,

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the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent." 463 U.S. at 733-734, quoting from *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

APPENDIX

(United States Code, Title 25)

§ 465. Acquisition of lands, water rights or surface rights; appropriations; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title or sections 608 to 608c of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

(June 18, 1934, c. 576, § 5, 48 Stat. 985; as amended Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

(Revised Code of Washington)

82.45.070 Tax is lien on property—Enforcement. The tax herein provided for and any interest or penalties thereon shall be a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid, which lien may be enforced in the manner prescribed for the foreclosure of mortgages. [1969 ex.s. c 223 § 28A.45.070. Prior: 1951 1st ex.s. c 11 § 9. Formerly RCW 28A.45.070, 28.45.070.]

82.45.080 Tax is seller's obligation—Choice of remedies. The tax levied under this chapter shall be the obligation of the seller and the department of revenue may, at the department's option, enforce the obligation through an action of debt against the seller or the department may proceed in the manner prescribed for the foreclosure of mortgages and resort to one course of enforcement shall not be an election not to pursue the other. [1980 c 154 § 3; 1969 ex.s. c 223 § 28A.45.080. Prior: 1951 1st ex.s. c. 11 § 10. Formerly RCW 28A.45.080, 28.45.080.]

QUESTIONS PRESENTED

1. Does the *Treaty With the Yakimas*, 12 Stat. 951, prohibit the state taxation of the reservation fee lands owned by the Yakima Nation and its members within the Yakima Indian Reservation?

2. Is the per se rule prohibiting state taxation of reservation Indians and their lands circumvented by Section 6 of the General Allotment Act (25 U.S.C. 349) even though allotment and assimilation policies popular at the turn of the last Century have since been completely repudiated by Congress?

3. Does the Washington Enabling Act continue to prohibit state taxation of reservation fee land which is owned by tribal members who have not severed their tribal affiliations?

4. Does the per se rule prohibiting state taxation of reservation Indians and their lands apply to an excise tax the state seeks to impose on the occurrence of a sale of reservation fee lands?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED	2
STATEMENT OF THE CASE.....	3
A. Historical Introduction	3
B. Allotments on the Yakima Indian Reservation... ..	4
C. The Yakima Indian Reservation at Present	7
D. The Present Conflict.....	9
E. The Decisions Below.....	10
SUMMARY OF ARGUMENT.....	12
ARGUMENT	13
I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWERS OVER ITS PEOPLE AND LANDS. THE PROMISE FROM THE UNITED STATES THAT THE YAKIMA RESERVATION WAS SET ASIDE FOR THE EXCLUSIVE USE AND BENEFIT OF THE YAKIMA PEOPLE HAS NOT BEEN ABRO- GATED.....	13
II. THE FEDERAL TRADITION GENERALLY ACTS AS AN ABSOLUTE BAR OF STATE TAXATION OF RESERVATION INDIANS AND LANDS.....	16
A. Congress Is Vested With Exclusive Juris- diction To Regulate Indian Tribes	16
B. States May Not Tax Indian Reservation Lands Or Indian Activities Carried On Within The Boundaries Of A Reservation In The Absence Of Specific Congressional Consent.....	18

TABLE OF CONTENTS - Continued

	Page
C. The Terms "Indian Country" And "Reser- vation Lands" Now Include Fee Lands Sit- uated Within Reservation Boundaries....	24
D. 25 U.S.C. 349 Is Not Specific Congres- sional Consent To State Taxation Of Reser- vation Indian Fee Lands	26
E. Other Jurisdictions Considering This Issue Have Determined There Is No State Jurisdic- tion To Tax Indian-Owned Fee Lands.....	32
F. The Yakima Land Consolidation Statute, 25 U.S.C. 608 Demonstrates The Confusion As To Whether Fee Lands Are Taxable By The State.....	34
III. THE WASHINGTON ENABLING ACT AND THE STATE CONSTITUTION DO NOT PER- MIT PROPERTY TAXATION OF FEE LANDS OWNED BY TRIBAL MEMBERS WITHIN A RESERVATION.....	36
IV. YAKIMA COUNTY'S EFFORTS TO IMPOSE AND COLLECT THE REAL ESTATE SALES EXCISE TAX ON SALES OF FEE LAND BY THE TRIBE AND ITS MEMBERS ARE UNLAWFUL	39
CONCLUSION	41

TABLE OF AUTHORITIES

Page

CASES

<i>Alaska Pacific Fisheries v. United States</i> , 248 U.S. 78, 89 (1918)	18
<i>Battese v. Apache County</i> , 129 Ariz. 295, 630 P.2d 1029 (1981)	11, 32
<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 208 (1989)	passim
<i>Bryan v. Itasca County</i> , 426 U.S. 373, 392 (1976)	18, 20, 22
<i>California v. Cabazon Band of Indians</i> , 480 U.S. 202, 212 n.17 (1987)	22, 26, 39
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	17
<i>Clairmont v. United States</i> , 225 U.S. 551 (1912)	25
<i>DeCouteau v. District Court</i> , 420 U.S. 425, 426 n.2 (1975)	26
<i>Delaware Tribal Business Comm. v. Weeks</i> , 430 U.S. 73 (1977)	17
<i>Dick v. United States</i> , 208 U.S. 340 (1908)	25
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	10, 27
<i>In Re Heff</i> , 197 U.S. 488 (1905)	29, 31
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553, 566 (1903) ...	15, 17
<i>McClanahan v. Arizona Tax Comm.</i> , 411 U.S. 164 (1973)	passim
<i>Mahler v. Tremper</i> , 40 Wn.2d 405, 409, 243 P.2d 627 (1952)	39
<i>Mattz v. Arnett</i> , 412 U.S. 481, 486 (1973)	20

TABLE OF AUTHORITIES - Continued

Page

<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	15
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973) <i>passim</i>	
<i>Moe v. Salish and Kootenai Tribes</i> , 425 U.S. 463 (1975)	passim
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759, 766 (1985) .	18, 22
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	24
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	17
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649, 655 n.7 (1976)	18
<i>Oklahoma Tax Comm. v. Citizen Bank Potawatomi</i> , 111 S.Ct. 905 (1991)	35, 39
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962)	6, 26
<i>Solem v. Bartlett</i> , 465 U.S. 463, 468 (1984)	19, 25, 30
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	40
<i>The Kansas Indians</i> , 5 Wall 737 (1867)	18, 19, 38, 40
<i>The New York Indians</i> , 5 Wall 761 (1867)	19
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	31
<i>United States v. Winans</i> , 198 U.S. 371 (1905)	14
<i>Warren Trading Post v. Arizona Tax Comm.</i> , 380 U.S. 685 (1965)	20
<i>Washington v. Colville Confederated Tribes</i> , 447 U.S. 134 (1980)	22, 33, 39, 40
<i>Washington v. Fishing Vessel Ass'n.</i> , 443 U.S. 658, 675 (1979)	15

TABLE OF AUTHORITIES - Continued

	Page
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1982).....	22
<i>Williams v. Lee</i> , 358 U.S. 217, 221 (1958).....	13

STATUTES

Act of July 28, 1955, 69 Stat. 392.....	34
Act of August 31, 1964, 69 Stat. 392.....	34
Act of November 1, 1988, 104 Stat. 206.....	36
Amendment to 25 U.S.C. 71, 102 Stat. 3641 (1988)....	15
Arizona Enabling Act, 36 Stat. 557, 569.....	21
Burke Act, 34 Stat. 182.....	5, 29, 31
Decent and Distribution Statute Act of June 25, 1910, 35 Stat. 855, 25 U.S.C. 373.....	29
Definition of "Indian Country", 62 Stat. 757, 18 U.S.C. 1151.....	25
Executive Order No. 11,670, 37 Fed. Reg. 10,431.....	7
Fallon Reservation Land Act, 92 Stat. 455.....	29
General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331, <i>et seq.</i>	4, 38
Indian Alcohol/Substance Abuse Act of 1986, 100 Stat. 3207, 25 U.S.C. 2401, <i>et seq.</i>	28
Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. 1901, <i>et seq.</i>	28
Indian Gaming Regulation Act of 1988, 102 Stat. 2467, 25 U.S.C. 2701, <i>et seq.</i>	29

TABLE OF AUTHORITIES - Continued

	Page
Indian Health Care Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601, <i>et seq.</i>	28
Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, <i>et seq.</i>	19, 20, 28, 38
Native American Languages Act of 1990, 104 Stat. 1153, 25 U.S.C. 2901, <i>et seq.</i>	29
Public Law 280, 67 Stat. 589, 28 U.S.C. 1360.....	22
Siletz Tribe Land Act, 94 Stat. 1072.....	29
Taos Pueblo Land Act, 84 Stat. 1437.....	29
Warm Springs Land Act, 86 Stat. 719.....	29
Trade and Intercourse Act of 1796, ch. 30, 1 Stat. 469.....	17
Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 730.....	17
Tribally Controlled School Act, 102 Stat. 385, 25 U.S.C. 2501, <i>et seq.</i>	28
Washington Enabling Act, 25 Stat. 656.....	2, 21, 36, 38
Yakima Land Consolidation Statute, 25 U.S.C. 608.....	34, 36
Yakima Surplus Land Statute, 33 Stat. 595 (1904).....	6
18 U.S.C. 1151.....	3, 11, 25, 32, 34
23 U.S.C. 348.....	6
23 U.S.C. 405.....	6
25 U.S.C. 320.....	6
25 U.S.C. 349.....	<i>passim</i>
25 U.S.C. 379.....	6
25 U.S.C. 404.....	6

TABLE OF AUTHORITIES - Continued

	Page
25 U.S.C. 601-607, 60 Stat. 968	7
R.C.W. 82.45.080	39
R.C.W. 84	35
R.C.W. 84.36.010, <i>et seq.</i>	33
R.C.W. 84.64.030	9

TREATIES

<i>Treaty With the Yakimas</i> , 12 Stat. 951	<i>passim</i>
<i>Treaty With the Navajos</i> , 15 Stat. 667	20

CONSTITUTIONAL PROVISION

Article I, Section 8, Clause 3	2, 16
Article VI, Clause 2	2
Article XXVI of the Constitution of the State of Washington	2, 36

OTHERS

F. Cohen, <i>Handbook of Federal Indian Law</i> (1982 Ed., Chap. 2, Sec. C.2)	5
Idaho Tax Comm., <i>Taxation Of Lands Within Indian Reservations Which Are Owned By Indians</i> (June 8, 1982)	32
McWhorter, <i>The Crimes Against the Yakimas</i> , Republic Printing (1913)	6
North Dakota Opinion Attorney General No. 85-12 (1985)	32
Oregon Department of Justice, <i>Taxation Of Indian Fee Land</i> , (advice letter dated March 14, 1983)	32

TABLE OF AUTHORITIES - Continued

	Page
<i>Readjustment of Indian Affairs: Hearings on H.R. 7902 Before House Comm. on Indian Affairs</i> , 73rd Cong. 2d Sess. 428-89 (1934), reprinted as D. Otis, <i>the Dawes Act and the Allotment of Indian Lands</i> (F. Prucha, Ed.) (University of Oklahoma Press, 1973)	5
Senate Report No. 2738, 58th Congress, 3d Session 4 (1904)	5

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U.S. SUPREME COURT
CONFEDERATED

In The
Supreme Court of the United States

October Term, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners,

**CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,**

Respondent.

**CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION,**

Cross-Petitioner,

v.

**COUNTY OF YAKIMA AND DALE A.
GRAY, Yakima County Treasurer,**

Cross-Respondents.

On Writs Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit

BRIEF OF RESPONDENT/CROSS-PETITIONER

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Nos. 90-408 and 90-577
CONSOLIDATED

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CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

In addition to the statute set forth in the Brief of the Petitioners/Cross-Respondents, the following Constitutional provisions, treaties and statutes are involved.

A. Constitutional Provisions: This case involves Article I, Section 8, Clause 3:

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

It also involves Article VI, Clause 2:

"This Constitution; and the Laws of the United States which shall be made in Pursuance thereof; all treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the land."

B. State Constitutional Provisions: This case involves Article XXVI of the Constitution of the State of Washington, which is identical to the Washington Enabling Act, 25 Stat. 656 which provides in pertinent part as follows:

"Does agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribe; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . and that no taxes shall be imposed by the state on lands or properties therein belonging to or which may hereafter be purchased by the United States or reserved for use; provided, that nothing in this ordinance shall preclude the state from taxing as other lands are taxed, any lands owned or held by any Indian who has

severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and accept such lands as may have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such extent as such act of Congress may prescribe."

C. Treaties Involved: This case involves the *Treaty With the Yakimas*, 12 Stat. 951.

D. Statutes Involved: In addition to 25 U.S.C. 349, this case involves 18 U.S.C. 1151:

"Except as otherwise provided in Sections 1154 and 1156 of this title, the term 'Indian Country' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights of way running through said reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same."

STATEMENT OF THE CASE

A. Historical Introduction: The Confederated Tribes and Bands of the Yakima Indian Nation entered into a Treaty with the United States in 1855. This Treaty, the *Treaty With the Yakimas*, was ratified by the United

States Senate, and signed by President James Buchanan in 1859, 12 Stat. 951. In the *Treaty*, the Yakima Nation ceded 10.8 million acres of land to the United States. This ceded land now constitutes the bulk of Central Washington. [J.A. 24]

In the *Treaty*, the Yakima Nation reserved, for its *exclusive use and benefit*, approximately 1.3 million acres of land which is now known as the Yakima Indian Reservation. (Article III of *Treaty*, 12 Stat. 951). The majority of the reservation lands are located in what is now Yakima County which came with Washington's statehood in 1889. [J.A. 43]

The *Treaty With the Yakimas* also guaranteed to the Yakima Nation that the Tribe was reserving its right to self-government, to make its own laws and be ruled by them. The Yakima Nation has continued its tribal government from the time of the *Treaty* to the present and its governing body continues to be recognized by the United States. The Yakima Nation is not a stranger to this Court, having recently presented arguments in a dispute with Yakima County over zoning jurisdiction on the Yakima Indian Reservation in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 208, 106 L.Ed.2d 343 (1989).

B. Allotments on the Yakima Indian Reservation: Because this case involves real property allotments, and a construction of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331, *et seq.*, the Yakima Nation believes a brief review of the allotment process on the Yakima Indian Reservation may be helpful.

Allotment of Indian reservation lands was an assimilationist policy prevalent in the latter portion of the Nineteenth Century. The process of allotment and assimilation was deemed important in order to absorb the Indian into the mainstream of American life and destroy the "savagery" represented by tribal autonomy. The General Allotment Act of 1887 culminated years of debate on allotment proposals. It was the prevailing view of Congress that the destruction of the tribal system was inevitable. Allotment was considered central to the civilization of Indians because of the dramatic difference in white concepts of individual property ownership as opposed to the Indian concept of tribal, nonindividual, property management. In summary, the purpose of the General Allotment Act was to end tribal organization and absorb the Indian people into the American mainstream, eventually subjecting them to all state and local jurisdiction.¹

On the Yakima Indian Reservation, it is clear that the primary source of authority for allotments to the Yakima people was the General Allotment Act. The majority of land allotted on the Yakima Indian Reservation was accomplished prior to the adoption of the Burke Act, 34 Stat. 182, which amended 25 U.S.C. 349. By 1904, nearly 300,000 acres of land had been allotted to Yakima members.²

¹ See *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before House Comm. on Indian Affairs*, 73rd Cong. 2d Sess. 428-89 (1934), reprinted as D. Otis, *the Dawes Act and the Allotment of Indian Lands* (F. Prucha, Ed.) (University of Oklahoma Press, 1973). Also see F. Cohen, *Handbook of Federal Indian Law* (1982 Ed., Chap. 2, Sec. C.2)

² See Senate Rep. No. 2738, 58th Congress, 3d Sess. 4. (1904)

Allotment of lands to Yakima Indians was not the only manner in which reservation lands were broken into individual parcels and fee patents issued. The corollary to the assimilationist policy of allotment was the policy of reservation surplus land sales. Congress passed a surplus land statute applicable to the Yakima Indian Reservation in 1904, 33 Stat. 595. This surplus land act was somewhat similar to the surplus land act at Colville which this Court considered in *Seymour v. Superintendent*, 368 U.S. 351 (1962) and did not diminish the reservation. The record below does not contain information as to how much, if any, land passed out of trust pursuant to the surplus land act.³

³ The judgment of the District Court was rendered upon cross-motions for summary judgment. The District Court determined that for purposes of the Court's decision there were no material facts needing further investigation. Accordingly, no investigation was made concerning the fee lands at issue to determine the manner in which the property passed out of a trust status and the statutory authority therefor. There were a variety of other authorities allowing reservation lands to pass out of trust to a fee patent. In addition to 25 U.S.C. 349, fee patents may have possibly been obtained pursuant to 25 U.S.C. 320, 23 U.S.C. 348, 25 U.S.C. 379, 25 U.S.C. 404 and 23 U.S.C. 405. In spite of these authorities and the Surplus Land Act of 1904, the Yakima Reservation remained intact for the most part as the Yakimas fought bitterly against the opening of their reservation. Their strong opposition in part defeated proposed legislation known as the Jones Bill of March 6, 1906, which would have required Yakima allottees to sell 60 acres of their 80 acre allotment to pay the cost of irrigation canal construction. McWhorter, *The Crimes Against the Yakimas*, Republic Printing (1913).

C. *The Yakima Indian Reservation at Present:* The Yakima Indian Reservation continues to encompass the lands described in Article II of the *Treaty With the Yakimas*. In fact, the only modern change to the recognized boundaries of the Yakima Indian Reservation was an expansion which occurred in 1972 when the sacred Mt. Adams was returned to the Yakima Tribe by the United States by Executive Order No. 11,670, 37 Fed. Reg. 10,431. Of the 1.3 million acres within the reservation, 1.04 million acres or 80% remain trust lands, most of which is unallotted timber and range lands owned by the Yakima Tribe. [Brendale, 106 L.Ed.2d 343, 353] The trust lands of the reservation are not subject to state property taxation. The remaining 260,000 acres is fee land. Less than 1% of the fee land is owned by the Tribe and/or its members. [J.A. 37]

There were approximately 7,600 members of the Yakima Nation when this litigation was commenced in the District Court.⁴ [J.A. 37] The majority of tribal members live on the Yakima Indian Reservation. [J.A. 37] The government of the Yakima Nation plays a large role on

⁴ The suggestion by Yakima County in its Brief at p. 31 that the Yakima Nation might relax its blood-quantum standard for enrollment with the purpose to expand the number of members and increase the number of persons with tax immunity is preposterous. The Yakima Nation jealously protects the integrity of its membership rolls to insure only Yakima people receive per-capita distributions of tribal income. Furthermore, Yakima blood-quantum requirements have been established by Congress at 25 U.S.C. 601-607, 60 Stat. 968, legislative enactments of which Yakima County is apparently unaware.

the reservation. In addition to the grants from and contracts with the United States Government, the Yakima Nation spends in excess of \$5,000,000.00 of its tribal income annually to fund programs of the tribal government. [J.A. 19] Tribal income is derived primarily from the sale of timber and the leasing of unallotted lands. [J.A. 19] The Yakima Nation spends nearly as much as Yakima County does for law enforcement on the reservation even though tribal membership constitutes approximately 20% of the reservation population. [J.A. 38] Each member of the Yakima Nation contributes approximately \$700.00 per year to fund the cost of the active tribal government, no distinction being made between tribal members living on fee lands and those living on trust lands. [J.A. 20, 21]

As was described in *Brendale*, 106 L.Ed.2d 343, 353, 354, 368, 369, the Yakima Indian Reservation is divided into a restricted or "closed" area and an "open" area. The restricted area consists of approximately 807,000 acres of forest and range lands. The Yakima Nation prohibits permanent structures in the restricted area. Members of the Yakima Nation residing on the reservation live in the "open area", primarily on trust property. The "open area" portion of the reservation is mostly irrigated, agricultural land. The open area has four small towns, Toppenish, Wapato, Harrah and White Swan which have a combined population of approximately 10,000.

In recent times, members of the Yakima Nation have begun to acquire fee property for a place to live. Approximately 104 tribal members were identified as owning 139 fee land parcels within the Yakima Indian Reservation, which parcels were generally homesites and averaged

about 10 acres in size. [J.A. 37] Tribal members owning and living on fee lands within the reservation was at the root of this present controversy.⁵

D. *The Present Conflict:* The issues being presented to this Court in this case were prompted by the inability of a large number of tribal members to pay the County real estate taxes attributable to their reservation fee lands. In November, 1987, Yakima County had scheduled tax foreclosure sales on 37 parcels of reservation fee lands owned by 31 different tribal members. Nearly one-third of all tribal members owning fee land, were at least three years behind on property taxes. [J.A. 8-10] In Washington, real estate taxes must be three years delinquent before the County can foreclose on the property and sell it at a tax sale.⁶

In response to the plight of its members, none of whom had severed tribal affiliations, [J.A. 12] the Yakima Nation brought an action in the United States District Court for the Eastern District of Washington seeking a declaratory judgment and injunctive relief, to invalidate the County's imposition and collection of real estate taxes on fee lands of the Tribe and of tribal members. [J.A. 3-5]

⁵ Another consequence of the District Court's granting summary judgment is that no information or data was presented to the court as to when members of the Yakima Nation began to venture onto fee lands. Yakima County's brief implies that tribal members have been paying real estate taxes on fee lands for decades. This implication is disputed by the Yakima Nation which contends that land ownership in fee by tribal members is a circumstance that has developed to an appreciable degree in recent times.

⁶ R.C.W. 84.64.030

At the same time, the Tribe added a second cause of action seeking to invalidate the County's assessment and collection of the real estate sales excise tax from tribal members and the tribe on sales of fee lands within the reservation. [J.A. 6] Yakima County had previously refused to recognize that the tribe and tribal members were immune from this excise tax on such sales.

E. The Decisions Below: Shortly after the lawsuit was commenced, the District Court entered a temporary restraining order restraining Yakima County from selling the 37 parcels of fee land for the 1983 taxes. The District Court then considered cross-motions for summary judgment. [J.A. 17, 25] After considering the undisputed evidence which the parties submitted by both affidavit and by stipulation, the Honorable Alan A. McDonald ruled in favor of the Yakima Nation, that Yakima County lacked requisite jurisdiction to impose its property taxes upon the fee lands owned by members of the Yakima Nation, and issued a permanent injunction. [Yak. Co. Pet. 34a-39a] Judge McDonald considered the County's argument that 25 U.S.C. 349 constituted Congressional consent to such taxation. However, Judge McDonald was unable to find a meaningful distinction between the contentions of Yakima County and those of the State of Montana in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1975). The rejection of 25 U.S.C. 349 and of *Goudy v. Meath*, 203 U.S. 146 (1906) by this Court in *Moe* persuaded Judge McDonald that taxation of tribal and member-owned fee lands was likewise inconsistent with modern Congressional policy and not permissible.

The County appealed Judge McDonald's decision and judgment to the Ninth Circuit Court of Appeals.

After briefing and argument, the Ninth Circuit, in an unprecedented ruling, determined that a balancing test was the measure against which this issue should be contested in light of this Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, *supra*. The Ninth Circuit chose not to follow *Moe*, failed to give even lip service to *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1029 (1981), and rejected this Court's views as to the applicability of the Congressional definition of "Indian Country" found at 18 U.S.C. 1151. The Ninth Circuit reversed the District Court as to the property tax issue, remanding the case to Judge McDonald to consider whether the County's taxation impacted in a demonstrably serious manner the political integrity, economic security or the health and welfare of the Yakima Tribe. [Yak. Co. Pet. 1a-29a]

As to the second issue, the Ninth Circuit affirmed the District Court ruling that the real estate sales excise tax could not be imposed upon the tribe and tribal members on sales of reservation fee lands. Even though the result was correct, the Ninth Circuit Opinion was less than clear as to what authority was being relied upon to invalidate the excise tax on sales by tribal members. [Yak. Co. Pet. 29a-30a]

Petitions for Rehearing were filed by both the County and the Tribe and were denied by the Ninth Circuit. Realizing the Tribe could demonstrate the serious impact of the tax⁷, Yakima County petitioned this Court for a

⁷ The Ninth Circuit Opinion acknowledged that the Yakima Nation had provided evidence that such taxation would affect it in a demonstrably serious way. See Opinion at 903 F.2d 1207 at 1218 (Yak. Co. Pet., p. 28a).

Writ of Certiorari. The Yakima Nation thereafter filed its Cross-Petition with this Court in order to argue and defend its position that the District Court judgment was correct and should be reinstated.

SUMMARY OF ARGUMENT

The Yakima Nation is a sovereign Indian tribe with Treaty guaranteed rights by virtue of the *Treaty With the Yakimas*, 12 Stat. 951. In this *Treaty*, the United States promised the Yakima Nation that the lands of the Yakima Reservation would be for the exclusive use and benefit of the Yakima Nation. The abrogation of this *Treaty* provision may have been contemplated by the General Allotment Act but it did not occur as this assimilation legislation was repudiated by Congress in 1934.

The Yakima Nation contends that this Court has stated a per se rule which provides that state taxation of reservation Indians and their lands is prohibited absent express consent by Congress. Allotment era legislation, which has been completely rejected by Congress does not serve as express consent to the taxation of reservation fee land owned by the Yakima Nation and its members. Under the authority of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1979), allotment and assimilation legislation such as 25 U.S.C. 349 can no longer be relied upon by states as jurisdictional authority to tax Indian-owned fee lands within reservations.

Furthermore, the Washington Enabling Act prohibits state property taxation of reservation fee lands owned by tribal members who have not severed tribal affiliations.

25 U.S.C. 349 does not constitute consent from Congress permitting the State to tax a member's reservation fee lands who has not severed tribal relations because this statute, as part of the General Allotment Act, anticipated that tribal organizations would be destroyed and the Indian reservations would be dissipated.

Finally, the Yakima Nation argues that the state excise tax sought to be imposed upon the Yakima Nation and its members for the sale of reservation fee lands is unlawful under the per se rule that states have no jurisdiction to tax reservation Indians and their lands.

ARGUMENT

I. THE YAKIMA INDIAN NATION IS A TREATY SOVEREIGN WITH INHERENT POWERS OVER ITS PEOPLE AND LANDS. THE PROMISE FROM THE UNITED STATES THAT THE YAKIMA RESERVATION WAS SET ASIDE FOR THE EXCLUSIVE USE AND BENEFIT OF THE YAKIMA PEOPLE HAS NOT BEEN ABROGATED.

The *Treaty With the Yakimas*, 12 Stat. 951, sets forth the areas of land ceded to the United States and describes the land reserved by the Yakima Nation for its "exclusive use and benefit". This Court has interpreted and explained the legal effect of similar Treaty language. In *Williams v. Lee*, 358 U.S. 217, 221 (1958), this Court stated the following:

"In return for [Indian] promises to keep peace, this treaty 'set apart' for their *permanent* home a portion of what has been their native country . . . " (emphasis supplied)

The *Treaty With the Yakimas* was the subject of this Court's attention in *United States v. Winans*, 198 U.S. 371 (1905). Here, this Court said:

"And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection and counterpoise the inequality which looks only to the substance of the rights, without regard to technical rules'."

Winans, at 380.

"In other words, the treaty was *not* a grant of rights to the Indian, but a grant of rights from them, a reservation of those not granted." (emphasis supplied)

Winans, at 381.

In addition to having the promise of the *exclusive use and benefit* of their reservation, the *Treaty With the Yakimas* also provided:

"Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon said reservation without permission of the tribe and the superintendent and agent." (emphasis supplied)

If the *Yakima Treaty* was the dispositive document, the resolution of this issue would be far less complicated as there can be little doubt that if this Treaty was construed as the Indians understood it, state property taxation of member-owned fee land would not be permitted.

Even though the *Treaty With the Yakimas* may not be the complete answer to this question, it is important and

should be considered carefully. *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 174 (1973). An Indian treaty is essentially a contract between two sovereigns. *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 675 (1979). The United States Constitution provides at Article VI, Clause 2:

"This Constitution; and the Laws of the United States which shall be made in Pursuance thereof; *all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme law of the land.*" (emphasis supplied)

Indian Treaties and rights thereunder will not be considered abrogated by legislation unless there is a clear and specific showing in the later legislation that abrogation was intended. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Congress may have the power to abrogate an Indian Treaty, though "such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interests of the country and the Indians themselves, that it should do so. . . . That in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians". *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

The present Congressional respect for Indian treaties and the rights guaranteed to Indian tribes is reflected by the 1988 reaffirmation of and amendment to 25 U.S.C. 71, 102 Stat. 3641. This statute provides, in part:

" . . . but no obligation of any treaty lawfully made and ratified with any such Indian Nation or tribe prior to March 3, 1871, shall be invalidated or impaired."

This legislation is significant because it restates a statute passed in 1871, demonstrating Congressional embracement of the Treaty rights of Indian people, some 50 years after the end of the allotment and assimilation era.

The Yakima Nation submits that the guarantee that the reservation lands would be for the Tribe's "exclusive use and benefit" and would always be the *permanent* home of the Yakima people, where no white man could enter the reservation without their consent, prohibits the state taxation at issue. Although the allotment and assimilation legislation may have been toward abrogation of these Treaty rights, the allotment and assimilation process was halted in 1934 and was never completed. The complete abrogation of many treaty rights did not occur. As to members of the Yakima Nation, the Treaty rights concerning Yakima Reservation land should be intact.⁸ The Yakima Nation urges this Court to give appropriate consideration to the Treaty document.

II. THERE EXISTS A FEDERAL TRADITION PROHIBITING STATE TAXATION OF RESERVATION INDIANS AND LANDS.

A. Congress Is Vested With Exclusive Jurisdiction To Regulate Indian Tribes.

The framers of the Constitution placed the responsibility for Indian tribes with Congress, not with states. Article I, Section 8, Clause 3 provides that Congress is:

⁸ The Yakima Nation recognizes that with respect to the *non-members* residents of the Yakima Indian Reservation, Treaty rights and promises are viewed from a much different perspective. This Court's decision in *Brendale* remains fresh to the Yakima Nation and we make no claims or assertions as to non-member owned fee lands in this case.

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

Historical examples this Congressional responsibility include the Trade and Intercourse Act of 1796, ch. 30, 1 Stat. 469; and the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 730, 25 U.S.C. 180.

This Court has continuously recognized the federal government's exclusive power to provide Indian legislation. In *Lone Wolf v. Hitchcock*, *supra*, this Court stated the concept that Congressional power over Indian affairs was plenary to the point that Indian Treaty rights could be abrogated by Congress. The doctrine of the plenary authority of Congress over Indian matters has consistently been recognized by this Court throughout this century. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).

Even though Congress was vested with plenary authority over Indian matters, this Court has required Congress to temper its authority with a trust responsibility to Indian tribes. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Mr. Chief Justice Marshall concluded that Indian tribes "may be denominated domestic dependent nations . . . in a state of pupillage" and that "their relation to the United States resembles that of a ward to his guardian". *Id.* at 17. The fulfillment by Congress of this trust responsibility toward Indian people serves as a constitutional basis for Congressional legislation singling out Indians for particular treatment. *Morton v. Mancari*, 417 U.S. 535 (1974).

The trust obligation and responsibility of the United States to Indians has also led to the development of canons of construction by this Court. Key canons of construction important to this case include: "Doubtful expression must be resolved in favor of Indians who are the wards of the nation, dependent upon its protection and good faith", *McClanahan*, at 174; and that "statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians", *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). This Court has called these canons of construction "eminently sound and vital", *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976). These canons of construction have been instrumental in this Court's development of the doctrine of traditional Indian immunity from state taxation. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

B. States May Not Tax Indian Reservation Lands Or Indian Activities Carried On Within The Boundaries Of A Reservation In The Absence Of Specific Congressional Consent.

The premise that states may not tax Indian lands or activities within an Indian reservation is of judicial origin which this Court recognized and has developed over more than a century.

An early, significant case in which the issue of state taxation of Indians was presented is *The Kansas Indians*, 5 Wall 737 (1867). Here, this Court considered whether the state could impose a land tax on reservation Indians. The

Shawnee Tribe had located to a reservation and in addition to the tribal lands held in common, some of its members owned land in severalty. The Court rejected the state's efforts to impose a land tax upon the lands held in severalty primarily on the basis that:

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority."

The Kansas Indians at 756.

Consistent with *The Kansas Indians* was this Court's judgment in *The New York Indians*, 5 Wall 761 (1867).

Twenty years after these cases were decided, Congress shifted into the allotment and assimilation era which was spearheaded by the General Allotment Act of 1887. For the next 40 years, Congressional policy was aimed at the elimination of tribal governments and reservations, and the assimilation of the individual Indians. The prevailing wisdom of Congress was that within a short time, a generation at most, the Indian reservation system would cease to exist. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984).

When the miserable failures of the allotment and assimilation policies were finally confronted, Congress adopted the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq.* With this legislation, Congress

rejected and repudiated allotment and assimilation policies. *Mattz v. Arnett*, 412 U.S. 481, 486 (1973). Congress replaced the repudiated policies with policies geared toward encouraging and strengthening tribal government, halting the alienation of tribal lands, and developing improvements to the tribal economic conditions, including reacquisitions and consolidation of tribal land holdings. See 25 U.S.C. 461, *et seq.*

Following the Congressional divorce from allotment and assimilation policies, there existed a certain degree of confusion and uncertainty by Indian tribes, and Congress for that matter, as to the extent of state power to levy taxes on Indian people within Indian reservations. See *Bryan v. Itasca County*, *supra*, at 391 and 392. The first post-assimilation case from this Court dealing with this issue was *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685 (1965). In this case, this Court invalidated a tax on the gross proceeds of sales by an Indian trader licensed by the United States who was doing business with Navajo people on the Navajo Indian Reservation. In so holding, this Court found that the state tax was preempted because it would frustrate federal purposes and could disturb and disarrange federal legislation.

Eight years after *Warren Trading Post*, this Court announced its landmark decisions in *McClanahan v. Arizona Tax Comm.*, *supra*, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The analysis and reasoning of this Court in these cases, serves as the current foundation for the consideration of whether any form of state taxes are lawfully applied to reservation Indians and their lands. In *McClanahan*, this Court began its consideration of the validity of the disputed state income tax with the *Treaty*

With the Navajos, 15 Stat. 667. The pertinent portions of the Navajo Treaty are virtually the same as the Yakima Treaty. The Court then examined Arizona's disclaimer of jurisdiction inside Indian reservations in its Enabling Act, 36 Stat. 557, 569. Again, there is no significant difference between the Arizona Enabling Act and the Washington Enabling Act⁹. Relying on this "backdrop", the Court discussed and disposed of each of the state's contentions and concluded the opinion by stating:

"However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the state is *totally* lacking in jurisdiction over both the people and the *lands* it seeks to tax. In such a situation, *the state has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.*" (emphasis supplied)

McClanahan at 181.

The breadth of the *McClanahan* opinion was summarized in *Mescalero*, wherein this Court provided:

"Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, *there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.*" (emphasis supplied)

Mescalero at 148.

⁹ The Washington Enabling Act which contains a disclaimer by Washington over Indian lands not only serves as a portion of the "backdrop" for consideration of the preemption analysis, but also serves as a separate and independent basis to invalidate the challenged property tax, which argument is set forth hereinbelow.

After *McClanahan* and *Mescalero*, this Court decided *Bryan v. Itasca County*, *supra*, and responded to the argument that Public Law 280, 67 Stat. 589, conferred upon the states the requisite jurisdiction to tax reservation Indians. This Court answered that Pub. L. 280 did not confer such jurisdiction. In the opinion, Mr. Justice Brennan could find no intent from Congress to waive the Indians' traditional immunity from state taxation. Applying the canons of construction applicable to Indian issues, a unanimous Court recognized that the enactments' express recognition of the non-taxability of trust property does not by implication authorize other forms of state taxation of reservation Indians. *Id.* at 390, 391. This is a concept that Yakima County and its supporters fail to appreciate. Congressional recognition of the tax-exempt status of trust lands *does not by implication* serve as affirmative consent to the state taxation of Indian-owned fee lands. This is the clear and resounding message from *Bryan*.

There have been a number of other cases in which this Court has applied the *McClanahan* principles. It would serve no purpose to retrace the Court's analysis of each case in which this Court struck down state taxation of reservation Indians.¹⁰ However, one recent case contains a particularly poignant message from this Court that seems to summarize the law as to this issue. In *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17

¹⁰ Examples of such cases include *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1982); *Washington v. Colville Tribes*, 447 U.S. 134 (1980); and *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

(1987), Mr. Justice White summarized the status of the laws as follows:

"In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees under the Indian Mineral Leasing Act of 1938. We stated: 'In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.' *Id.*, at 765. We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), we distinguished state taxation from other assertions of state jurisdiction. We acknowledged that we had made repeated statements 'to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . . Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation; and *McClanahan*

v. Arizona State Tax Comm'n, [411 U.S. 164 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." *Ibid*.

The per se approach of this Court to issues of state taxation of reservation Indians is difficult to reconcile with the Ninth Circuit's determination that a *Brendale* balancing approach is the appropriate test. *Brendale* and its predecessor, *Montana v. United States*, 450 U.S. 544 (1981), involved jurisdictional disputes between tribal and state governments over regulatory authority applicable to *non-Indians on reservation fee lands*. The Ninth Circuit opinion cannot be supported by the Yakima Nation even though it was prepared to demonstrate the serious, detrimental impact of the County's taxes upon its political integrity, economic security and general welfare.

C. The Terms "Indian Country" And "Reservation Lands" Include Fee Lands Situated Within Reservation Boundaries.

When applying the *McClanahan* and *Mescalero* opinions to this case, an obvious concern that comes to mind is whether this Court would have distinguished fee lands from trust or restricted lands when using the broader language of "reservation lands". The Yakima Nation submits that in the context of *McClanahan* and *Mescalero*, the phrase "reservation lands" includes both trust lands and fee lands. As this may be the crux of the matter, further inquiry into what categories of lands comprised the general term "reservation lands" is warranted.

The opinions in *McClanahan* and *Mescalero* do not define "reservation lands". However, had this Court

intended to limit the reach and import of these opinions and statements regarding states authority to tax within recognized reservations, surely Mr. Justice Marshall and Mr. Justice White would have used the terms "trust" or "restricted" lands in their respective opinions. This supposition by the Yakima Nation is supported by the fact that Congress had in 1948 put an end to the confusion of what lands were considered "reservation lands" by establishing the definition for "Indian Country", 62 Stat. 757, 18 U.S.C. 1151. In this Congressional definition, "Indian Country" means in part:

"(a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent and, including rights of way running through the reservation, . . . " (emphasis supplied)

Mr. Justice Douglas in his separate opinion in *Mescalero*, acknowledged this Court's recognition of the term "Indian Country". *Id.* at 161.

Prior to the adoption of the 1948 definition, the term "Indian Country" arguably did not include unrestricted fee lands within a reservation or right-of-ways to which Indian title had been extinguished. See, *Dick v. United States*, 208 U.S. 340 (1908), *Clairmont v. United States*, 225 U.S. 551 (1912), and *Solem v. Bartlett*, *supra*, at 468. By providing "Indian Country" to include all reservation lands, notwithstanding the issuance of a fee patent, Congress eliminated jurisdictional differences depending on whether the land in question was fee or trust. This Court had confronted the import of the "Indian Country" definition of 18 U.S.C. 1151 some ten (10) years prior to

McClanahan and Mescalero in Seymour v. Superintendent, supra.

In later decisions, this Court has not limited the "Indian Country" definition at 18 U.S.C. 1151 strictly to questions of criminal jurisdiction, a position argued by Yakima County. This Court has explicitly recognized that 18 U.S.C. 1151 has a bearing upon questions of civil jurisdiction as well as criminal jurisdiction. See *DeCouteau v. District Court*, 420 U.S. 425, 426 n.2 (1975) and *California v. Cabazon Band of Indians*, at 207 n.5. Based on these authorities, it is inconceivable to the Yakima Nation that the words "reservation lands" which were used in the above-quoted passages from *McClanahan* and *Mescalero*, were limited in scope or meaning to restricted or trust lands.

D. 25 U.S.C. 349 Is Not Specific Congressional Consent To State Taxation Of Reservation Indian Fee Lands.

Yakima County and its supporters each argue that the per se rule of *McClanahan* is avoided as to the more specific issue of state taxation of Indian fee lands by Section 6 of the General Allotment Act, 25 U.S.C. 349. This same argument was previously presented to this Court by the State of Montana in *Moe v. Salish and Kootenai Tribes, supra*, and it was thoroughly rejected.

In *Moe*, this Court was confronted with the question of whether the State of Montana had requisite jurisdiction to impose and collect personal property taxes, particularly personal property taxes on motor vehicles, which were owned by members of the tribe residing on the

reservation. The Flathead Reservation is remarkably similar to the Yakima Reservation in size, population, and in ratio of Indian population to total population. A considerable amount of fee lands were owned by both tribal members and non-Indians as, unlike the Yakima Reservation where 80% of the land remains as trust, slightly more than half of the Flathead Reservation was fee land.

In order to avoid the application of *McClanahan* and *Mescalero*, the State of Montana argued by virtue of Section 6 of the General Allotment Act, Congress had granted states civil jurisdiction over Indians, including jurisdiction to impose personal property taxes. The state also relied on *Goudy v. Meath, supra*, a decision of this Court, which was made during the time allotment and assimilation policies were law, which held that the state taxing jurisdiction was among the laws to which an Indian patentee was made subject after receiving a conveyance of a fee patent pursuant to 25 U.S.C. 349. The state attempted to build on *Goudy* and the fact that the General Allotment Act has never been "repealed", claiming that Montana's taxing jurisdiction, at least on fee lands, had never been withdrawn and that such power continued to the present. *Moe* at 477.

Mr. Chief Justice Rehnquist (then Mr. Justice Rehnquist) writing for all members of the Court, rejected the state's arguments finding them "untenable". *Moe* at 478. The opinion then provides that state jurisdiction to impose personal property taxes on Indians living on fee lands would substantially diminish the Flathead Reservation in size, a result contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction. The opinion then reminded Montana that the General Allotment

Act and related legislation of that era was founded on a policy of assimilation and abolishment of reservations in their entirety. And that such policies were repudiated by the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq.* and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands. *Moe* at 479.

The Yakima Nation fails to comprehend a meaningful distinction between the circumstances presented in *Moe* and those now before this Court. The statute in question, 25 U.S.C. 349, by unambiguous language clearly purports to subject Indians residing upon lands in fee to both the civil and criminal laws of the state in which they reside. However, the plain language of the statute and the obvious intent of Congress in 1887 and 1906, was discarded in *Moe* which teaches that the assimilation legislation of a bygone period of time must be examined critically with respect to recent Indian legislation and in light of the current policies of Congress.¹¹

¹¹ Since the *Moe* decision was handed down in 1975, Congress has passed numerous enactments with a core premise of encouraging and strengthening tribal self-government. Moreover, it is now the policy of Congress that Indian tribes must have a solid land base for economic development and housing needs. Examples of such Congressional findings and legislation include Indian Health Care Act of 1976, 90 Stat. 1400, 25 U.S.C. 1601, *et seq.*; Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. 1901, *et seq.*; Indian Alcohol/Substance Abuse Act of 1986, 100 Stat. 3207, 25 U.S.C. 2401, *et seq.*; The Tribally Controlled School Act, 102 Stat. 385, 25 U.S.C. 2501, *et seq.*, wherein Congress found "Indians will never surrender their desire to control their relationships both among themselves

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Yakima County and its amici argue that while *Moe* may have invalidated the general jurisdiction granted to states by 25 U.S.C. 349, that the Burke Act (34 Stat. 182) proviso remains viable.¹² This argument simply cannot bear scrutiny. The legislative history for the Burke Act demonstrates it was passed specifically in response to *In Re Heff*, 197 U.S. 488 (1905) for two stated purposes. The first purpose was to delay conferring citizenship upon an Indian allottee, until the end of the trust period when a fee patent was issued. Supporters of the Burke Act believed that delaying citizenship was necessary because if an Indian became a citizen at the time of receiving his

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and with the non-Indian governments, organizations and persons"; Indian Gaming Regulation Act of 1988, 102 Stat. 2467, 25 U.S.C. 2701, *et seq.* wherein Congress found, "a principal goal of Federal Indian Policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"; and the Native American Languages Act of 1990, 104 Stat. 1153, 25 U.S.C. 2901, *et seq.*, wherein Congress found "special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights including the right to continue separate identities". Congressional acts for the purpose of expanding tribal land base include the Taos Pueblo Land Act, 84 Stat. 1437; Warm Springs Land Act, 86 Stat. 719; Siletz Tribe Land Act, 94 Stat. 1072; and Fallon Reservation Land Act, 92 Stat. 455.

¹² The County and its supporting amici attempt to bridge allotment and assimilation legislation over a gap of 50 years after Congressional repudiation. Contrary to the Amici Brief of the National Association of Counties, at p. 11, Congress has not recently amended an Allotment Act statute. 25 U.S.C. 373 is a Decent and Distribution Statute which came about by Act of June 25, 1910, 35 Stat. 855, approximately 23 years after the General Allotment Act was passed.

allotment in trust, states were placed in the awkward position of having jurisdiction over the Indian while having no jurisdiction over his property.¹³ The second was to give the Secretary of the Interior the power to issue a fee patent and confer citizenship to an allottee prior to the end of the 25 year trust period when the Secretary deemed it was proper.¹⁴ The legislative history is void of a suggestion that the Burke Act was intended to confer upon the states the ability to tax the fee patents. Congress did not voice a concern as to this question when considering the Burke Act as it was believed tribal governments and the reservation system would be destroyed and states would soon assume complete jurisdiction. *Solem v. Bartlett*, *supra*, at 468.

After reviewing this legislative history, the Yakima Nation asks, what Congressional purposes behind the Burke Act remain unrepudiated so as to give the Burke Act proviso to 25 U.S.C. 349 a vitality which survives the repudiation of the statutes original text? The idea that an Indian could not become a citizen until receiving a fee patent for his allotment has surely been repudiated. All Indians are citizens whether their property is trust or fee. Also, the authority granted to the Secretary of the Interior to issue a fee patent prior to the end of the 25 year trust

¹³ The ironic dichotomy of the present case is that Yakima County now argues the equally awkward position that states should have jurisdiction over a reservation Indian's fee land while not having general jurisdiction over the individual Indian.

¹⁴ See Brief for La Plata County, Colorado, et al., as Amici Curiae in support of Yakima County, pages 22a through 26a, for this legislative history.

period is a concept totally repudiated and completely replaced by the statutes of the Indian Reorganization Act. Even the holding in *In Re Heff*, *supra*, was reversed by *United States v. Nice*, 241 U.S. 591 (1916). Each of the purposes behind the Burke Act Amendment to 25 U.S.C. 349 has been thoroughly rejected by Congress and replaced with other legislation. When the lessons of *Moe* are applied to the Burke Act Amendment to 25 U.S.C. 349, one is compelled to ask, how can the Burke Act legislation be any less repudiated than the general jurisdiction grants to states contained in the statute? Would not state jurisdiction to tax Indian-owned fee lands reduce the size of the Yakima Reservation to the Indian people as much, if not more¹⁵, as state jurisdiction to impose other taxes?

The Yakima Nation submits the allotment legislation relied upon by the County has been effectively repudiated. In summary, the decision of Judge McDonald of the District Court correctly applied the *Moe* principles to this case.

¹⁵ A comparison of a general/personal property taxing jurisdiction versus real property taxing jurisdiction is not intended to suggest personal property tax issues are of lessor concern. However, a personal property tax liability may involve payments of money and at most, the seizure of personal property, for example, a vehicle. But the inability to pay real estate taxes may result in the forfeiture of one's home. The loss of the sanctity of a home to any family is catastrophic. Being at risk to loose your home on some lands of the Yakima Reservation and not others unquestionably reduces the size of the Yakima Reservation to the Yakima people.

E. Other Jurisdictions Considering This Issue Have Determined There Is No State Jurisdiction To Tax Indian-Owned Fee Lands.

In deciding to contest this issue and in its presentation of legal authorities to the District Court and the Ninth Circuit, the Yakima Nation has relied heavily on the opinion of the Arizona Supreme Court in *Battese v. Apache County*, *supra*. In *Battese*, the Arizona court had before it the identical issue now before this Court. That court concluded that Arizona had no lawful jurisdiction to tax fee lands owned by members of the Navajo Tribe within the Navajo Reservation. The Yakima Nation is not aware of any fact or circumstance which would permit a distinguishment of *Battese* with this dispute. The Arizona Court examined *McClanahan*, *Mescalero*, 18 U.S.C. 1151 and other authorities discussed in this brief and concluded that the state simply did not have the taxing jurisdiction.

Following *Battese*, the executive branches of at least three states determined that state taxation of Indian-owned fee lands was no longer lawful. In Idaho, Oregon and North Dakota taxation of Indian-owned fee lands within recognized reservations was discontinued.¹⁶ Discontinuation of taxation of Indian fee lands has not bankrupted the states of Arizona, Idaho, Oregon and North Dakota. These states and the affected counties

¹⁶ Idaho Tax Comm., *Taxation Of Lands Within Indian Reservations Which Are Owned By Indians*, (June 8, 1982); Oregon Dept. of Justice, *Taxation Of Indian Fee Land*, (advice letter dated March 14, 1983); and N.D. Op. Attorney Gen. No. 85-12 (1985).

therein are no doubt providing essential governmental services. The amici supporting Yakima County have provided conclusionary statements to this Court with little or no supporting data regarding the dire need to tax the fee lands of the Indian tribes¹⁷ and the Indian people. Before becoming caught up in the hysteria portrayed by supporters of Yakima County, one must remember that these same arguments were no doubt made prior to this Court's invalidation of the state income tax on tribal members in *McClanahan*; this Court's invalidation of the personal property taxes in *Moe*, this Court's invalidation of the vehicle excise taxes in *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980); and the list goes on. The Yakima Nation submits that depriving 31 member families of their homes for non-payment of taxes to a government, which has no civil regulatory authority or jurisdiction¹⁸ over them, is a considerably more tragic

¹⁷ Yakima County and the State of Washington's position that revenue needs require the taxation of tribal fee lands is baffling. State law provides property tax exemptions to more than 40 different categories of property. R.C.W. 84.36.010, *et seq.* The property of all other forms of government, including that of the United States, the counties, cities, towns, schools, irrigation districts, etc., is exempt. In spite of a state policy of exempting all other governmental entities from property taxes, Yakima County, the state, and the amici urge this Court to sustain taxes on the government of the Yakima Nation. The Yakima Nation submits that no rational distinction exists which would justify such a discriminatory position.

¹⁸ The foremost example of a lack of civil regulatory jurisdiction involves the recent zoning dispute which was before this Court in *Brendale*. An issue in the parties' briefing was whether Yakima County could zone the fee lands owned by

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circumstance than the loss of some relatively insignificant tax revenues.

F. The Yakima Land Consolidation Statute, 25 U.S.C. 608 Demonstrates The Uncertainty As To Whether Fee Lands Are Taxable By The State.

This land consolidation statute has been cited by Yakima County as support for its position before this Court. A careful review of the statute and its history demonstrates that the County's argument should not be well taken. The original version of 25 U.S.C. 608 was a portion of an Act of July 28, 1955, 69 Stat. 392. Under the 1955 statute, the Secretary of the Interior was only authorized to purchase trust lands within the Yakima Indian Reservation for the Yakima Tribes.

By Act of August 31, 1964, 69 Stat. 392, Congress amended 25 U.S.C. 608, and expanded the land base from which such purchases could occur. The Secretary of the Interior was authorized to:

"(1) purchase for the Yakima Tribes, with any funds of such tribes, and to otherwise acquire by gift, exchange, or relinquishment, any lands or interest in lands or improvements thereon within the Yakima Indian Reservation or within

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tribal members. However, Yakima County conceded in oral argument before this Court that it did not have jurisdiction to zone member-owned fee land. Brendale transcript of oral argument, p. 12. Moreover, the criminal jurisdiction of Yakima County is limited by 18 U.S.C. 1151, *et seq.* The Yakima people are governed locally by the Yakima Nation, a policy strongly supported by Congress.

the area ceded to the United States by the Treaty of June 9, 1855;"

By virtue of the 1964 Act, the Yakima Nation could own fee lands both inside *and outside* the Yakima Reservation. The 1964 Act added a new section which read in pertinent part as follows:

"(c) In all cases in which land being purchased is presently held by the grantor in fee simple, title shall be taken for and held by the Yakima Tribes in fee and such land shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington."

A couple of observations about this section of the 1964 Act need to be made. First, it is undeniably ambiguous and confusing. The legislation seems to have recognized a lack of tribal immunity from property taxes on fee lands (perhaps off-reservation fee lands) if the State had a specific statute attempting to tax tribally owned fee lands. However, no statute of the State from 1964 to the present, has sought to tax tribally owned fee lands. More importantly, the State does not have affirmative consent from Congress to tax fee lands. Congress could have easily provided, "and such lands shall be subject to state and local taxation," and affirmative consent would have existed.

As a final point, the 1964 Act did not provide a waiver of the Yakima Nation's traditional sovereign immunity from suit. A confrontation over non-payment of property taxes would have left the State in the embarrassing position of being unable to judicially enforce property taxes which may have been assessed. *Oklahoma Tax Comm. v. Citizen Bank Potawatomi*, 111 S.Ct. 905 (1991). The Yakima Nation submits that the quoted sentence reflects the general uncertainty and confusion which existed in 1964 as to state jurisdiction to tax

Indians inside reservations. This enactment occurred nine years prior to *McClanahan*. The Yakima Nation contends that a logical interpretation is that the quoted provision was neutral to reflect the fact that fee lands could be acquired both inside and *outside* the reservation, and that the fee lands owned outside the reservation could be taxable.

Recently, Congress put an end to the ambiguity. By Act of November 1, 1988, 104 Stat. 206, Section (c) of 25 U.S.C. 608 was amended and now reads as follows:

"(C) Lands and interests in lands acquired by the Secretary pursuant to subsection (a)(1) and for the benefit of the Yakima Indian Nation pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465) shall be held in trust by the United States for the benefit of the Yakima Indian Nation."

With the new amendment, now, even fee lands acquired outside the reservation are not subject to state taxation. There is no further confusion or jurisdictional clumsiness. It is the clear policy of Congress that the Yakima Nation should pay no real estate taxes to the state and/or county, even on fee lands purchased outside the Yakima Reservation.

III. THE WASHINGTON ENABLING ACT AND THE STATE CONSTITUTION DO NOT PERMIT PROPERTY TAXATION OF FEE LANDS OWNED BY TRIBAL MEMBERS WITHIN A RESERVATION.

The Washington State Enabling Act, 25 Stat. 656 contains a disclaimer of jurisdiction over Indian Reservation lands. This provision of the Enabling Act is repeated in Article XXVI of the Constitution of the State of Washington. The Washington disclaimer is very similar to the

Arizona disclaimer which this Court found to be significant in *McClanahan*. In addition to being part of the "backdrop" pertinent to the preemption analysis discussed hereinabove, the Yakima Nation submits that the Washington disclaimer serves as independent authority to invalidate Yakima County's efforts to tax the reservation fee lands of enrolled tribal members. The relevant portion of the Washington Enabling Act reads as follows:

"Does agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by an Indian or Indian tribe; and . . . said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . and that no taxes shall be imposed by the state on lands or properties therein belonging to or which may hereafter be purchased by the United States or reserved for use; provided, that nothing in this ordinance shall preclude the state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and accept such lands as may have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such extent as such act of Congress may prescribe." (emphasis supplied)

The Ninth Circuit considered this argument in its opinion. The Ninth Circuit determined that in spite of the clear disclaimer language that Congress could give its consent to states, including Washington, to tax the reservation fee lands of enrolled tribal members who have retained their tribal affiliations. The Ninth Circuit then

determined that 25 U.S.C. 349 manifested Congress' consent to such taxation. [Yak. Co. Pet., p. 9a-12a]

The Yakima Nation argues that 25 U.S.C. 349 was, at best, Congressional consent to states to tax the reservation fee lands of Indian people who had *severed* his or her tribal relations. Moreover, such consent was withdrawn in 1934 by the Indian Reorganization Act. As before, whether 25 U.S.C. 349 serves as such consent must be examined in light of the Congressional policy existing when the statute became law. As stated hereinabove, the disbandment of tribal organizations and the breaking up of Indian reservations were the goals and purposes of Congress in passing the General Allotment Act. Under the law of *The Kansas Indians, supra*, Congress knew in 1887 that "as long as the tribal organization is preserved intact", the Indians had a strong claim to total immunity from state taxation. As such, Congress was required to break up the reservations and destroy the tribes in order to confer jurisdiction to tax the Indians upon the states. The allotment legislation was intended to produce such results.

The Washington Enabling Act was nearly contemporaneous with the General Allotment Act. Examined together, the quoted section of the Washington Enabling Act permitting state taxation of Indians having severed their tribal relations, makes sense as within a generation, it was thought that the tribal organizations would be destroyed and all tribal relations severed. However, Congress discarded its allotment and assimilation policies prior to actual disbandment of the majority of tribal organizations and reservations. With the passage of the Indian Reorganization Act, Congress reversed itself and

began to encourage the tribal governments to, not only survive, but to become stronger and more active. Members of the Indian tribes were encouraged to maintain, not sever their tribal affiliations. Simply put, Congress could not have possibly contemplated that 25 U.S.C. 349 would serve as consent to the State of Washington to tax the reservation fee lands of Indians retaining tribal affiliation when it was believed that 25 U.S.C. 349 and the remainder of the General Allotment Act would soon break down and destroy tribal affiliations.

IV. YAKIMA COUNTY'S EFFORTS TO IMPOSE AND COLLECT THE REAL ESTATE SALES EXCISE TAX ON SALES OF FEE LAND BY THE TRIBE AND ITS MEMBERS ARE UNLAWFUL.

In the face of *McClanahan, Moe, Colville, Cabazon, etc.*, Yakima County maintains the legally unsupported position that it can impose and collect an excise tax on the Yakima Nation and its members on sales of fee land within the Yakima Indian Reservation.

The statutory framework for the excise tax makes the tax the seller's obligation. See, R.C.W. 82.45.080. As pointed out by the Ninth Circuit, this tax is not a tax upon the property itself. *Mahler v. Tremper*, 40 Wn.2d 405, 409, 243 P.2d 627 (1952). The authorities cited by Yakima County do not support the concept that the tax is lawfully applied to reservation Indians. The case of *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) was a case which this Court should limit in scope and to its particular facts. This was a dispute decided before Congress adopted its definition of "Indian Country". Moreover, the dispute was between the heirs of a deceased member of

one of Five Civilized Tribes of Oklahoma. This Court was unable to apply the rule of *The Kansas Indians* as the tribe in question had no effective tribal autonomy, and its members were citizens of the state with little to distinguish them from other state citizens. *Id.* at 603.

Yakima County also cites *Squire v. Capoeman*, 351 U.S. 1 (1956) to support its claim. This case is also out of context with the issues of the present controversy. *Squire v. Capoeman*, *supra*, concerned the issue of whether the income to an Indian allottee for the sale of timber was subject to federal taxes. In deciding that the income was exempt from federal taxes, this Court recognized that Congress in 1887 and again in 1906, intended that no taxation could be imposed on an Indian allottee until receiving the fee. It merits repeating that Congressional policy and intent as to the reach of state taxing jurisdiction of Indians inside reservations has changed, Congress having repudiated and rejected its assimilation and allotment legislation.

The fact that the tribe or a tribal member may sell reservation fee lands to a non-Indian cannot support the application of the tax. This issue has been foreclosed in the favor of the tribe by *Washington v. Colville Confederated Tribes*, *supra*, at 139. There, this Court recognized in the cigarette case that for tobacco products, the state excise tax fell upon the Indian retailer and not the non-Indian consumer. As a result, Washington's excise tax on tobacco product sales was invalid and not enforceable on reservation sales to non-Indians. This Court should affirm the ruling of the Ninth Circuit as to this issue.

CONCLUSION

The judgment of the Ninth Circuit should be reversed as to that portion of its opinion concerning taxation of the reservation fee lands. In reversing the Ninth Circuit, this Court should direct that a judgment be entered consistent with the opinion and judgment of Judge Alan A. McDonald of the District Court. This Court should affirm the Ninth Circuit as to that portion of its opinion concerning the excise tax, and in so doing, the Yakima Nation requests this Court to reaffirm the lessons from *Moe*, legal principals which are of vital importance to the survival of Indian tribes throughout the United States.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

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Yakima County Treasurer,
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On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**REPLY BRIEF OF
PETITIONERS/CROSS RESPONDENTS,
COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. INTRODUCTION	1
II. THE TRIBE ATTEMPTS TO ESCAPE THE RECORD	5
III. THE TRIBE DRAWS UNWARRANTED IN- FERENCES FROM <i>McCLANAHAN</i> AND <i>MESCALERO</i>	6
IV. THE TRIBE ATTEMPTS TO ELEVATE FEDERAL POLICIES OVER FEDERAL STATUTES	7
V. THE TRIBE'S RELIANCE ON THE WASH- INGTON STATE CONSTITUTION IS MIS- PLACED	8
VI. THE TRIBE WOULD PRE-CONDITION EF- FECTIVENESS OF THE STATUTE ON FUL- FILLMENT OF THE STATUTORY OBJEC- TIVE	9
VII. THE UNITED STATES MISCHARACTER- IZES THE ISSUES AND HOLDING IN <i>MOE</i> ..	10
VIII. THE UNITED STATES OFFERS A THEORY OF PREEMPTION INCONSISTENT WITH THE SUPREMACY CLAUSE	14
IX. THE UNITED STATES AND THE TRIBE WOULD DENY THE PLAIN MEANINGS OF THE WORDS "ALL", "TRUST", AND "FEE" IN THE STATUTES	16
X. THE UNITED STATES DISTORTS <i>SQUIRE</i> <i>v. CAPOEMAN</i>	17
XI. THE UNITED STATES MISCONSTRUES THE COUNTY'S EXCISE TAX ARGUMENT..	18
XII. CONGRESS IS THE PROPER FORUM FOR THIS TAX DISPUTE	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page
<i>A.F. of L. v. Watson</i> , 327 U.S. 582 (1946)	8
<i>Boeing Aircraft v. Reconstruction Finance Corp.</i> , 25 Wn.2d 652, 171 P.2d 838 (1946)	8
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	14
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912)	2
<i>Choteau v. Burnet</i> , 283 U.S. 691 (1931)	2
<i>City of Tacoma v. Andrus</i> , 47 F. Supp. 342 (1978)	2
<i>Cotton Petroleum v. New Mexico</i> , — U.S. —, 109 S.Ct. 1698 (1989)	15
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	2, 11, 12
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903)	5
<i>McClanahan v. Ariz. Tax Comm.</i> , 411 U.S. 164 (1973)	4, 6
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	6, 16
<i>Moe v. Confed. Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	passim
<i>Rosebud Sioux v. Kneip</i> , 430 U.S. 584 (1977)	10
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	2, 17
<i>The Kansas Indians</i> , 72 U.S., (5 Wall) 737 (1867)	4
<i>The New York Indians</i> , 72 U.S., (5 Wall) 761 (1867)	4
<i>U.S. v. John</i> , 437 U.S. 634 (1978)	15
<i>Washington v. Confed. Bands of Yakima</i> , 439 U.S. 463 (1978)	8, 14
<i>Washington v. Confed. Tribes of Colville</i> , 447 U.S. 134 (1980)	19

FEDERAL STATUTES

18 USC 1151	3, 4, 15
25 USC 331, et seq. (General Allotment Act)	2, 9
25 USC 349	passim
25 USC 352c (54 Stat. 298)	2
25 USC 461, et seq. (IRA)	2, 10
25 USC 465 (IRA Sec. 5)	2
25 USC 608(c)	2, 16
28 USC 1652	8
PL 83-280 (67 Stat. 588)	14

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
Washington Constitution, Art. XXVI	8, 9
RCW 82.45.070	18
50 I.D. 691 (Dec. 24, 1924)	2
53 I.D. 133 (June 30, 1930)	2
Brief of United States for Petitioner, Supreme Court Docket No. 55-134	2
Brief of United States for Petitioner, Supreme Court Docket No. 78-1756	2, 13, 17
25 CFR 151.10(e)	2
BIA.IA.0943	2, 3
March 22, 1979. Interior Memo	3
H.R. Rep. No. 306, 80th Cong., 1st Sess. A91-A92 (1947)	15

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YAKIMA COUNTY TREASURER

ARGUMENT

I. INTRODUCTION

Though several points discussed in the briefs of the Yakima Nation (hereinafter, the Tribe) and the United States warrant response, the most remarkable thing about all the opposing briefs is what they omit: a discussion of the unanimous understanding that has existed for a cen-

tury on the point at issue in this case; i.e., that tax status of Indian lands is a function of land tenure, with trust lands being exempt and fee lands being taxable. This understanding is reflected in the relevant acts of Congress from 1887 (Allotment Act), to 1934 (IRA Sec. 5), to 1940 (25 USC 352c), to 1964 (25 USC 608(c)); in Interior Department Land Decisions and Memoranda from 1924 (50 I.D. 691), to 1930 (53 I.D. 133), to 1989 (BIA.IA.0943); in the decisions of this Court in *Choate v. Trapp*, 224 U.S. 665 (1912), *Choteau v. Burnet*, 283 U.S. 691 (1931) and *Squire v. Capoeman*, 351 U.S. 1 (1956), not to mention *Goudy v. Meath*, 203 U.S. 146 (1906); in the federal regulation governing U.S. acquisitions of trust lands for Indians, 25 CFR 151.10(e); in the Government's own briefs to this Court in *Squire* and *U.S. v. Mitchell*, 445 U.S. 535 (1980); and it was the very basis for the litigation in *City of Tacoma v. Andrus*, 47 F. Supp. 342 (1978), in which the United States Interior Secretary was a party.

Most of the foregoing authorities were discussed in the County's opening brief and need not be revisited here. 25 USC 352c and two relevant Department of Indian Affairs memoranda, however, have not. They deserve mention.

25 USC 352c was enacted in 1940 as 54 Stat. 298. It authorizes the Secretary of Interior to refund, in some cases at least, property taxes imposed on lands patented to an Indian in fee "prior to the expiration of the period of trust without application by or consent of the patentee".¹ It also authorized the Secretary, in certain cases, to satisfy and release judgments for *state* or *county* taxes on such lands.² By engrafting 352c onto 25 USC Chapter 9

¹ Authority for such accelerated fee patents was the Burke Act (now 25 USC 349, first proviso).

² The full text of 25 USC 352c reads:

The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees, or Indian heirs or Indian devisees of allottees, for all

(subject of allotment of lands), Congress acknowledged again in 1940 that the tax exemption of Indian lands was based on their *trust status* and that the taxes to which they became subject, upon termination of such status, included state and county taxes.

In 1989, the Office of the Solicitor for the Department of the Interior issued a memorandum on state taxation of reservation Indian fee lands, BIA.IA.0943. This 1989 memo (Appendix pp. 1a-3a) rescinded an earlier 1979 Solicitor's opinion (Appendix pp. 4a-5a) that 25 USC 349 authorized taxation of reservation Indian fee lands. This 1989 reversal of position stands in sharp contrast to the United States' assertions in this case that the State never had authority to tax these lands or lost that authority in 1948 with the enactment of 18 U.S.C. 1151. The 1979 memo was written to answer the property tax question presented here, in light of the then recent decision in *Moe v. Confed. Salish & Kootenai Tribes*, 425

taxes paid, including penalties and interest, on so much of their allotted lands as have been patented in fee prior to the expiration of the period of trust without application by or consent of the patentee: *Provided*, That if the Indian allottee, or his or her Indian heirs or Indian devisees, have by their own act accepted such patent, no reimbursement shall be made for taxes paid, including penalties and interest, subsequent to acceptance of the patent: *Provided further*, That the fact of such acceptance shall be determined by the Secretary of the Interior.

In any case in which a claim against a State, county, or political subdivision thereof, for taxes collected upon such lands during the trust period has been reduced to judgment and such judgment remains unsatisfied in whole or in part, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes including penalties and interest paid thereon, and upon payment by the judgment debtor of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case, upon submission of adequate proof, the claims for taxes paid by or on behalf of the patentee or his Indian heirs or Indian devisees have been satisfied, whole or in part, by the State, county, or political subdivision thereof, the Secretary of the Interior is authorized to reimburse the State, county, or political subdivision of such amounts as may have been paid by them.

U.S. 463 (1976). Division of Indian Affairs Associate Solicitor, Thomas W. Fredericks, there said:

I am unable to agree . . . that Indian-owned fee land within reservations is exempt from state and local real property taxation.

and concluded:

I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax exempt Indian land depend [sic] upon its being trust or restricted land.

The Tribe and its amici, the United States and Mashantucket Tribe et al., offer several alternative theories on the taxation by states of reservation Indian fee lands. They may be summarized as follows: (1) The State of Washington (and hence Yakima County) has never had authority for such taxation; (2) the State once had this tax authority, but it was taken away by the combined weight of a series of Indian statutes adopted since 1934 and the policies behind them and; (3) the State once had this authority but it was taken away with the enactment in 1948 of 18 USC 1151. These theories are not only mutually inconsistent, but unsound even when examined separately. Theory 1 moreover is in conflict with a century of unanimity on the subject.

The United States cites *The Kansas Indians*, 72 U.S. (5 Wall) 737 (1867), *The New York Indians*, 72 U.S. (5 Wall) 761 (1867) and modern cases beginning with *McClanahan v. Ariz. Tax. Comm.*, 411 U.S. 164 (1973) (U.S. Brief, p. 18) for the proposition that tribal Indians and their property are presumptively beyond the reach of state authority. In *Kansas Indians* as in *New York Indians*, the state's lack of authority as to tribal Indian lands was based simply upon the language of the applicable treaty or convention. *McClanahan* cited *Kansas* and *New York* and refashioned their rules as a presumption of no taxation without Congressional consent. Yet the Court did not set forth this presumption as a pure and free-standing judicial principle. Rather it stated that

issues of state tax authority vis a vis reservation Indians are to be decided by reference to the applicable treaties and statutes, avoiding platonic notions of Indian sovereignty (411 U.S. at 172).

This is, of course, as it should be. Inasmuch as *Kansas Indians* and *New York Indians* are the source for the modern formulation, *McClanahan* merely recognizes that the treaties and executive orders creating the reservations all contain language of enduring tribal rights. The lesson of *Kansas Indians* and *New York Indians*, is that Indian tax immunities come from the treaties and statutes, rather than Indians' inherent status. Therefore, just as they are created by Congress (or executive order), they are subject to defeasance or limitation by Congress. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Yakima County submits that, at least here, where federal statutes address the issues, the proper judicial calculus does not even involve any presumption of Indian exemption.³

II. THE TRIBE ATTEMPTS TO ESCAPE THE RECORD

The Yakima Tribe attempts to confound the issues in this case and divert attention from the General Allotment Act and its tax provision, 25 USC 349, citing other statutes which may, in some other case, have authorized the alienation of reservation lands (Resp. Brief, p. 6, n.3). The uncontroverted affidavit of the County Assessor, however, establishes that the *only* Yakima Indian-owned realty inside the Yakima Reservation taxed by Yakima County is that realty previously patented in fee *under the Allotment Act* (J.A. 29-30). There are no other allotment or patenting statutes or mechanisms involved here.⁴

³ Indeed, the presumption in favor of taxation applied in most other tax cases would be more appropriate. In general, exemptions are construed in favor of the government and against the taxpayer. *Hale v. Iowa State Board*, 302 U.S. 95, 103 (1937).

⁴ In any case, 25 USC 335, enacted in 1923, incorporated the provisions of the Allotment Act for the treatment of *all* lands purchased under Congressional authority for Indians. Though subsequent special exceptions have been created (e.g. 25 USC 409a), the Allotment Act clearly provides the general rule.

III. THE TRIBE DRAWS UNWARRANTED INFERENCES FROM *McCLANAHAN* AND *MESCALERO*

The Tribe relies on a passage from *McClanahan* for the proposition that there exists no statutory authority for taxing reservation Indian fee lands (Resp. Brief, p. 21). The passage implies that since Arizona lacked authority to tax the particular Navajo Reservation lands where a tribe member earned her income, the State would also consequently lack authority to tax such income. The passage reads:

"However relevant the land-income distinction may be in other contexts, is plainly irrelevant when, as here, the tax is restricted because the state is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the state has no more jurisdiction to reach income generated on reservation lands than to tax the land itself." (411 U.S. at 181)

The Tribe infers that states lack jurisdiction to tax any and all reservation Indian lands, in total disregard of the Court's words "when, as here" the State of Arizona lacked such jurisdiction. Lands inside the Navajo Reservation which had not been removed from trust status would therefore have been exempt from taxation by the State of Arizona and likewise, presumably, state tax on Indian income earned there. Reservation fee lands, of course, present a different question. There is nothing in the *McClanahan* opinion to suggest that Rosalind McClanahan's income was earned on fee land. Moreover, while holding that *McClanahan's income* was not taxable, the Court noted that the land-income distinction may be important "in other contexts". Such other contexts are created, for example, by statutes which refer expressly to the taxation of reservation Indian lands, as does Section 349.

The Tribe then moves on to cite *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), as confirming or summarizing the "breadth" of *McClanahan*. (Resp.

Brief, p. 21). The passage quoted by the Tribe,⁵ however, comfortably accommodates the tax authority asserted here, by referring to the "cession of jurisdiction or other statutes permitting" taxation of Indian reservation lands. 25 USC 349 is obviously just such a statute.

IV. THE TRIBE ATTEMPTS TO ELEVATE FEDERAL POLICIES OVER FEDERAL STATUTES

The Tribe contends that recent enactments aimed at "encouraging and strengthening tribal government" (Resp. Brief, p. 28, n.11) change the effect of 25 USC 349 as adopted in 1887 and amended in 1906. None of these recent statutes repeals Section 349 nor conflicts with taxation thereunder in any way. Rather, the supposed effects on Section 349 are the result of the congressional *policies* of encouraging tribal economic development and self-government which have animated Congress in recent years. By the same reasoning, taxes on export producers could be invalidated by Congressional policies favoring international trade, without the cumbersome necessity of statutory language on the subject of such taxes. If the operation of a specific tax statute is determined by the unspoken social policy of some *other* statute, then application of the U.S. Code becomes a hopeless exercise in reading the Congressional mind.

The Tribe contends that the adoption of the Burke Act and its proviso to Section 349 (according to which "restrictions as to the . . . taxation of [patented] land shall be removed"), had the purpose and effect of *delaying* the conferral of individual Indian citizenship until the issuance of a fee patent to land, while *hastening* the time when such patent could be issued. (Resp. Brief, p. 29-30). This interpretation fails to give any meaning to the text re-

⁵ The passage reads: "Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero* at 148.

garding removal of tax restrictions. Yakima County squarely asserts that this text of this statute has meaning.

V. THE TRIBE'S RELIANCE ON THE WASHINGTON STATE CONSTITUTION IS MISPLACED

The Tribe relies on Art. XXVI of the Washington State's Constitution taken from this State's enabling Act, 25 Stat. 656, for the proposition that lands of Indians who maintain tribal membership are therefore immune from all state taxation. (Resp. Brief, pp. 36-38). This contention must fail for several reasons.

First, Art. XXVI is a general state disclaimer of title to Indian lands combined with an acknowledgement of *Congressional control* for purposes which expressly included taxation, and with an exception from this control for certain lands of certain Indians. As explained by the Court of Appeals (Cert. Pet. No. 90-408, p. 9a), Congress' control over the subject was exercised with the adoption of the Allotment Act, Sec. 6 (now Section 349) and results in the taxability of these lands.

Second, the Washington Supreme Court has interpreted Art. XXVI to mean that the property of a federal instrumentality is subject to state taxation to the extent that Congress has consented to taxation. *Boeing Aircraft v. Reconstruction Finance Corp.*, 25 Wn.2d 652, 663, 171 P.2d 838, 845 (1946). That determination is a rule of decision for this Court under 28 USC 1652 and *A.F. of L. v. Watson*, 327 U.S. 582 (1946).

Third, the Yakima Tribe recently raised Article XXVI as a supposed barrier to Washington's assumption of limited civil and criminal jurisdiction over the Yakima Reservation under PL-280. *Washington v. Confed. Bands*, 439 U.S. 463 (1978). This Court there held that, where authorized by act of Congress, state statute was sufficient basis for the state exercise of on-reservation jurisdiction, and that the disclaimer of such jurisdiction in Art. XXVI did not constitute an independent barrier to such exercise.

Fourth, the exception to the state's deferral to Congress of property tax authority is for lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except lands specially exempted by Congress. This provision was apparently drafted with the Allotment Act in mind. Both the Washington Enabling Act and Art. XXVI were adopted in 1889, a mere two years after the Allotment Act, and the treatment of patented Indian lands is the same in each: patented lands are taxable after expiration of the trust but not before. From the timing and correspondence of the Allotment Act and Art. XXVI, it appears that in this context the severance of tribal relations means severance of communal relations *respecting the land* conveyed; i.e., the substitution of individual, unrestricted land title for the former relationship to commonly held tribal land.

VI. THE TRIBE WOULD PRE-CONDITION EFFECTIVENESS OF THE STATUTE ON FULFILLMENT OF THE STATUTORY OBJECTIVE

The Tribe argues that the tax provision of the Allotment Act should not be honored because the assimilation of Indians into the larger society, (the policy behind the Act) was never fully realized. (Resp. Brief, p. 39) Under this reasoning virtually no statute would be effective, since legislative purposes are not self-fulfilling. This argument, that the tax effects of the Allotment Act must either apply to the entire reservation or to none of the reservation, was also made by the State of Montana in *Moe, supra*.

Based on extensive fee patenting in the Flathead Reservation and the extent of assimilation of its tribal Indian residents, Montana argued for the taxation of all of them and all their personal property. This all-or nothing type of argument was rejected in *Moe* and should likewise be rejected here. The essence of Montana's argument was

that, since the end of the reservations and total assimilation of Indians were the policy objectives of the Allotment Act, and since substantial progress had been made toward these objectives on the Flathead Reservation, the Court should treat them as having been fully realized, despite the halting of the process by the IRA in 1934. Similarly, the Tribe here argues that, since the elimination of the reservations and assimilation of Indians into the larger society was interrupted before completion, the Court should now rule as if the Allotment Act and the many land patents granted under its authority had never happened. The argument is no better for winding back the clock here than was that for winding it forward in *Moe*.

As in *Moe*, this Court in *Rosebud Sioux v. Kneip*, 430 U.S. 584 (1977), considered the diminishment of reservation by means of specific federal Indian statutes aimed at such diminishment. In explaining its decision the Court said:

The intent of Congress in the 1904, the 1907, and the 1910 Acts was to change the boundaries of the original 1889 Rosebud Reservation. Much has changed since then, and if Congress had it to do over again it might well have chosen a different course. But, as we observed in *DeCoteau v. District County Court*, . . . "[O]ur task here is a narrow one . . . [W]e cannot remake history". 430 U.S. 615.

VII. THE UNITED STATES MISCHARACTERIZES THE ISSUES AND HOLDING IN *MOE*

The United States, in describing the holding in *Moe*, says the case "specifically held that Section 6 does not authorize a state to tax reservation Indians who received fee patents to allotments." (U.S. Brief, p. 7) This is a distortion of the case and its holding. There was no discussion in the opinion of whether the Indians involved in *Moe* had received any allotments or any fee patents thereto. Rather the issues in and holding of this Court, as disclosed by the opinion, concerned applicability of Montana's cigarette license tax, cigarette sales tax and

personal property tax to the cigarette licenses, sales and personal property of all Indians in the Flathead Reservation, without regard to any allotment or land-patent history.⁶

The issue in *Moe* was not, as the United States asserts, whether the state could tax Indians, but rather whether it could tax the *issuance* of cigarette retailers' licenses *to them*, sales of cigarettes *by them*, and their *personal property itself*, in rem. Montana's theory in *Moe* would have required this Court to go beyond the holding in *Goudy v. Meath*, 203 U.S. 146 (1906) (upholding taxation of real property) and beyond the plain language of the general laws clause of the Allotment Act, Section 6. (allottee to be subject to civil laws of the state). *Moe* involved neither taxes upon the land nor upon an allottee, and the Court's rejection of Montana's argument there does not, and should not, resolve this case. In contrast to *Moe*, we are concerned here with (1) a tax directly on the land as referred to in the proviso to Section 6 and (2) with a tax on sales thereof by Indians. The tax on land, therefore, is outside the scope of *Moe* and within that of the statute.⁷ The real estate excise tax is within the scope of the *Moe* rules on cigarette sales taxes, such that sales to Indians are exempt from taxation while those to non-Indians are liable to tax.

The United States contends that this Court's refusal to apply *Goudy* to the *Moe* case or to expand *Goudy's* reading of the general laws clause, Section 6, "forecloses Yakima County's attempt to impose the state property tax on Indian-owned fee lands on the Yakima Reservation by

⁶ The Court described the litigation in the District Court as "separate attacks on the State's cigarette sales and personal property taxes applied to reservation Indians." 425 U.S. 465. The one reference to land tenure actually involved in the case is as to the *trust* land on which Indian Joseph Wheeler's smoke shop was located. 425 U.S. 467.

⁷ This same view is expressed in the 1979 Interior Department memorandum on the subject. (Full text *infra*, pages 5a-7a)

invoking the language of the principal clause of Section 6 . . .” (U.S. Brief, p. 10). The Government’s contention, simply stated, is that *Moe* overruled *Goudy*. *Goudy* however, was decided on two separate grounds: (1) That removal of restrictions on voluntary alienation of the land carried with it the removal of restrictions on “involuntary alienation” by means of the tax lien (203 U.S. 149); (2) That the civil laws referred to in Section 6 included Washington’s property tax laws. (Id.) Only the second ground was addressed in *Moe*. The first is still valid and is sufficient alone to dispose of the property tax issue here. Moreover, Yakima County believes that, in *Moe*, this Court recognized personal property taxes as a distinct issue from real property taxes under Section 6 and asks for the same recognition here.

Recognizing that the proviso of Section 349 was not addressed in *Moe*, the United States offers a three-step argument to deny that its removal of “restrictions as to . . . taxation” leaves the subject lands taxable. Its first assertion is that if the general laws clause does not permit taxation, then the proviso added to the statute in 1906 cannot do so, because a proviso is presumed to relate to the same “*subject matter*” as the principal clause (U.S. Brief, p. 12). Yakima County agrees that the general laws clause and the proviso of Section 349 both relate to the same subject, namely the extension of state power in consequence of issuance of an Indian fee patent. However, they do so in *different ways*. The principal clause is general, leaving some specific issues (such as that presented in *Moe*) to be resolved and it prescribes a 25-year wait for the removal of restrictions on an allotment. The proviso on the other hand, is very specific, leaving little or nothing to interpretation and it contrasts with the main clause by permitting the 25-year trust period to be shortened or waived.

In any event while this proviso relates in some way to the subject matter of the principal clause (as by nature any proviso should), its effect is not therefore limited to the effect of the principal clause. A proviso, after all,

does not merely illustrate, summarize or affirm its principal clause. Rather, in its proper role at least, it states an exception, limitation, or contrast to the principal clause. Rather, in its proper role at least, it states an exception, limitation, or contrast to the principal clause. The word “provided” when used in this context means a restraint modification or exception to the thing which precedes. Blacks Law Dictionary, 3rd Ed., 1968. The exception represented by Section 349’s proviso is to the 25-year trust period for allotments as provided for in Section 348 and the expiration of said period in full, before fee patenting under the principal clause of 349.

Second, the United States argues that there is nothing in the statutes or common sense to justify different tax treatment of fee lands based on whether they remained in trust allotted status for 25 years (under the original statute) or a shorter period (under the 1906 proviso). On this point Yakima County agrees. Since restrictions as to taxation of the fee lands patented early (under the proviso) are thereby removed, taxability of these lands is inescapable. Consistent treatment of the full-term fee lands with the accelerated fee lands therefore requires that all be subjected to taxation. This indeed, was an unquestioned and fundamenal principal from at least the time of the Allotment Act until the *Moe* decision in 1976. Indeed, two years later, the United States recognized this at page 24 of its Brief for Petitioner in *U.S. v. Mitchell*, Docket No. 78-1756. Now the United States disingenuously rejects the century-old distinction between fee lands (as taxable) and trust lands (as exempt) in favor of recently concocted alternative theories.

The third step of this Section 6 argument (U.S. Brief, p. 12) is to invoke *Moe*’s expression of disfavor for checkerboard jurisdiction. If reservation Indian fee lands are taxed while trust lands are exempt, the United States argues “the result would be a variant of the “checkerboard” pattern of state jurisdiction the Court rejected in *Moe*”. This “variant” however, is the natural consequence of the statute’s removal of “restrictions as to the

. . . taxation" of the fee lands, without a similar treatment of *personalty*, which was involved in *Moe*.

The checkerboard jurisdiction now before the Court was created according to the Allotment Act as intended by Congress. In similar fashion, Congress created a second source of checkerboard jurisdiction with the adoption of PL 83-280 in 1953. PL-280 authorized states to assume jurisdiction over certain criminal and civil matters involving Indians and arising within reservations. Checkerboard jurisdiction under PL-280 has been considered and approved by this Court in *Washington v. Confederated Bands*, 439 U.S. 463, 502. Though state authority under the Allotment Act (*Moe*) and PL-280 (*Bryan v. Itasca County*) has been narrowly construed, this Court has always given effect to the language of the statutes.

Yakima County acknowledges that checkerboard jurisdiction is problematical in some contexts where searching of real property records is impractical. However, such searches are in the very nature and essence of the real property tax assessment/collection function. The task of county tax officials in distinguishing fee lands from trust lands inside the reservation is practically the same as that of distinguishing exempt church properties or governmental properties, or partially exempt senior citizen-owned real properties⁸ from other properties.

VIII. THE UNITED STATES OFFERS A THEORY OF PREEMPTION INCONSISTENT WITH THE SUPREMACY CLAUSE

An alternative theory offered by the United States (U.S. Brief, p. 14) is that a preemption barrier to taxation of these lands remains, despite the removal of restrictions as to taxation under Section 6. Preemption, of course, is based on the Supremacy Clause, as recognized in the *Moe* decision itself. 425 U.S. 480-81, n.17. It serves to prevent interference with a federal statutory scheme,

⁸ RCW 84.36.381.

regarding a subject within Congress' control. Here the state actions of Yakima County are *consistent* with the statutory scheme regarding tax treatment of reservation Indian lands and in no way inconsistent with the numerous ameliorative Indian statutes cited at p. 22, n.21 of the Government's Brief. All these, in various ways, afford their own specific benefits to Indian tribes and/or members. But a general Congressional *purpose* to benefit Indians cannot legitimately be translated into an unspoken exemption from taxes where the *words* of the U.S. Code, expressing the specific will of Congress as to this particular issue, take away such exemption. Underlying federal Indian policies are obviously useful in interpreting Indian statutes but legislative policies do not, in any of themselves, have greater force than legislative text. The Supremacy Clause makes United States treaties and statutes the supreme law of the land, subordinate only to the Constitution.

The United States places particular reliance on the 1948 amendments to Title 18 of the United States Code as a basis for, in effect, implied repeal of the Section 6 proviso. (U.S. Brief at 19-21). This is patently meritless. Whatever the precise scope of "Indian country" prior to the amendments, the sole purpose of 18 USC 1151 was to provide a reasonably precise description of the territory to which certain federal criminal statutes apply. See H.R. Rep. No. 306, 80th Cong., 1st Sess. A91-A92 (1947). See also, *U.S. v. John*, 437 U.S. 634 (1978). The United States asserts that by expanding certain federal jurisdiction to include reservation Indian fee lands, Congress thereby cut off the State's authority to tax these lands. However, even *taxing* jurisdiction of one government does not necessarily defeat the concurrent taxing jurisdiction of another. *Cotton Petroleum v. New Mexico*, — US —, 109 S.Ct. 1698 (1989).

The United States argues that by applying the "Indian country" definition in *some* civil contexts this court has swept away the taxing authority over these lands granted

by Congress. The extension of non-tax judicial principles to this tax case, in derogation of a federal statute on the subject, is not supportable. Indeed, even *within* the subject area of Indian taxation, as observed by this Court in *Mescalero Apache Tribe v. Jones*, 411 US 145, 148 (1973), generalizations are particularly treacherous.

Finally, even if the 1948 definition of "Indian country" is deemed to bring taxation of the fee lands under federal jurisdiction, Section 349 still constitutes the exercise of that jurisdiction, such that all restrictions as to taxation thereof are now removed.

IX. THE UNITED STATES AND THE TRIBE WOULD DENY THE PLAIN MEANINGS OF THE WORDS "ALL", "TRUST", AND "FEE" IN THE STATUTES

The U.S. misleads with its contention that the restrictions on taxation removed by operation of the Section 6 are only those *imposed* by the Allotment Act itself. (U.S. Brief pp. 13-14) The words of the statute are, "all restrictions as to . . . taxation of said land shall be removed". The Government would interpret "all" to mean some but not others. This is nonsense, because (1) "all" means all and (2) there are no other restrictions as to taxation of these lands than the restriction inhering in federal trust status, so long as it exists.

The U.S., like the Tribe, interprets the former 25 USC 608(c) (before the 1988 and 1989 amendments) to have distinguished between tax treatment of lands based on their *location* relative to reservation boundaries, rather than on form of ownership. (U.S. Brief, pp. 24-25; Resp. Brief 34-35). But however appealing this might be from the standpoint of *policy*, the distinction made by Congress in the statute is between "*trust*" and "*fee*" lands as such, each of which types exists both inside and outside reservation boundaries. To transform the statutory criterion from land-tenure status to geographic location requires this Court to assume the legislative role.

X. THE UNITED STATES DISTORTS *SQUIRE v. CAPOEMAN*

The United States, while arguing against state tax authority over reservation Indian fee lands, asserts that it has such tax authority according to *Squire v. Capoeman*, 351 U.S. 1 (1956) (U.S. Brief, p. 15, n.13). It is clear from the *Squire* decision that exposure of the fee lands to taxation follows from the Allotment Act and, in particular, the proviso to 25 USC 349 (351 U.S. at 8). The bold contention of the United States is, in other words, that the statutes removal of "all restrictions as to . . . taxation" of these lands is effective for the United States but not for the states. There is no support in the statute, however, for this distinction, and indeed none in the United States' brief.

The United States attempts to gainsay *Squire* and the assertion of its Brief to this Court in that case (that the tax exemption of Indian lands ends when the trust status of the land ends) by reference to the historical fact that the taxes at issue in *Squire* predated the enactment of 25 USC 1151, the "Indian country" criminal statute. (U.S. Brief, p. 26) Yakima County would also emphasize, however, the historical fact that the Brief of the U.S. was submitted in 1955, seven years *after* the adoption of the "Indian country" statute. Moreover, the same position was expressed by the U.S. twenty-two years later in the case of *U.S. v. Mitchell* (see page 14, *supra*).

As to the *Mitchell* Brief, the Government contends (1) that the holding of allotments in trust under the Allotment Act (25 USC 348) serves to protect them from taxes though they are exempt, in any event, if located inside the reservations, and (2) that the supposed per se immunity of reservation Indian lands "does not alter that purpose". (U.S. Brief, p. 27). These assertions cannot be reconciled. If *all* reservation Indian lands are exempt from state taxation based on their location and regardless of trust or fee status, then the holding of

these lands in trust does *not*, as urged by the Government, serve the purpose of protecting the state tax exemption.

XI. THE UNITED STATES MISCONSTRUES THE COUNTY'S EXCISE TAX ARGUMENT

The United States asserts that the County "does not point to any statute" authorizing taxation of an Indian seller of land (U.S. Brief, p. 28, n.38). On the contrary, Yakima County considers 25 USC 349 to be such a statute, because of its language "all restrictions as to sale, incumbrance, or taxation of said land shall be removed". Yakima County submits that this broad range of restrictions encompasses the power to levy a real estate excise "*as to the sale*" and to encumber the property sold with a lien for the enforcement of such levy. Though the primary incidence of the Washington real estate excise tax is on the seller (RCW 82.45.080), the ultimate burden thereof, where not paid by (or chargeable against) the seller, is upon the property itself. RCW 82.45.070.

82.45.070 Tax as lien on property—Enforcement

The tax herein provided for and any interest or penalties thereon shall be a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid,

If there is any exemption, enjoyed by an Indian seller, against excise tax on his sale of land, this exemption does not bar the incumbrance of the land itself with a tax lien in view of the language of the statute, "whereby restrictions as to . . . *incumbrance* . . . of said land shall be removed" (emphasis added).

XII. CONGRESS IS THE PROPER FORUM FOR THIS TAX DISPUTE

There is one assertion of the United States with which Yakima County strongly agrees.

"It is, of course, for Congress ultimately to balance the needs equities, and to determine whether state taxation should be authorized. (U.S. Brief, p. 28)

In the same paragraph, the Government asserts that the revenue implications of this case for the County as "relatively insignificant", while "the potential harm to Indian Tribes is great . . .". However, the outcome of this case will also affect a multitude of other states, counties, school districts, fire districts, and countless other entities and the revenue they may derive to defray the cost of Indian reservation services enjoyed by Indians and non-Indians alike. The fiscal importance of the taxing authority involved here, and the proper balance of its consequences as between Indian and non-Indian governments, is plainly a policy matter which should be resolved by the elected representatives of the People, with due regard to all those affected. The legislative process is designed for such purposes. The judicial process is not.

In any event, adverse economic effects of state taxes on a tribe has been argued and rejected by this Court as basis for tax exemption. *Washington v. Confed. Tribes*, 447 U.S. 134, 157 (1980).

CONCLUSION

Yakima County respectfully prays that this Court reverse the Court of Appeals and declare the county's authority to assess and collect the challenged taxes.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.IA.0943

Mar 20, 1989

Memorandum

To: Field Solicitor, Twin Cities
From: Associate Solicitor, Division of Indian Affairs
Subject: Taxability of Indian-owned fee lands on
Indian reservations

In the attached memorandum dated March 22, 1979, the Associate Solicitor, Division of Indian Affairs, directed that your office not pursue claims on behalf of individual Indians who alleged that they had been unlawfully required to pay state taxes on fee lands that they owned within the boundaries of an Indian reservation. Because, for the reasons set out below, I have concluded that the legal conclusion in that prior opinion is in error, I am rescinding that opinion.

That a state may not, absent authorization by Congress, tax tribal members residing on an Indian reservation with respect to on-reservation activity is well-settled law. *Bryan v. Itasca County*, 426 U.S. 373, 376-377 (1976) (*Bryan*); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (*Moe*); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) (*McClanahan*); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (*Mescalero*).

Although none of the cited Supreme Court decisions has addressed an attempt by a state to tax Indian-owned land within a reservation, language in some of those decisions

suggests that a state is on weaker ground when it attempts to tax Indian ownership of land than when it imposes any other tax on Indians:

However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is totally lacking in jurisdiction over both the people and the lands it seeks to tax. In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself.

McClanahan at 181. See also *Bryan* at 376; *Moe* at 475-476; *Mescalero* at 148.

Our prior opinion, however, concluded that Congress had authorized state taxation of Indian-owned fee lands based on the following language from the General Allotment Act that is codified at 25 U.S.C. § 349:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; . . . Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed . . .

As our earlier opinion acknowledged, the Supreme Court has made it clear that the first portion of § 349 does not apply as each individual parcel loses its trust status, but only when all the lands have been allotted and the trust expired on all of them. *Moe* at 478-479 quoting *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Trust allotments con-

tinue to exist on virtually all reservations where allotments were made. As the federal district court pointed out when, in the attached decision in *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima*, No. C-87-654-AAM (E.D. Wash. May 10, 1988), it held that Yakima County may not tax Indian-owned fee land on the Yakima Indian Reservation, the Supreme Court in *Moe* declined to read § 349 as creating checkerboard jurisdiction within a reservation. *Slip op.* at 5-6. The same point is made in the attached letter dated March 14, 1983, from the Oregon Assistant Attorney General, Tax Section, advising that Indian-owned fee property on Indian reservations in the state is exempt from ad valorem taxation.

The March 22, 1979, memorandum from this Division, however, focused on the proviso, which states that whenever a fee patent is issued all restrictions as to taxation are removed, and construed that language as giving permission to states to tax Indian-owned fee land on a reservation. That proviso, however, makes no reference to states, but simply removes any restriction on taxation that had been in place because of the trust status of the land. Although restrictions on taxation are removed when a fee patent is issued for an individual parcel, removing those restrictions does not give a state jurisdiction it does not otherwise have. Once that restriction is removed, such land would have the same status for tax purposes as any other Indian-owned property on the reservation. While such property is probably subject to tribal taxation, see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), it may not be taxed by the state. *Bryan, supra*; *McClanahan, supra*. For that reason it is the tribe—rather than the state—that acquires jurisdiction to tax allotted land when a fee patent is issued to an Indian.

In addition to the federal court decision in *Yakima*, described above, two state courts have addressed the issue of state authority to tax Indian-owned fee property on

an Indian reservation and both concluded that such land is exempt from state taxation. The Supreme Court of Arizona reached that conclusion in *Battese v. Apache County*, 630 P.2d 1027, 129 Ariz. 295 (1981) (*Battese*), with respect to an ad valorem tax and the California Court of Appeals held that the state may not impose its inheritance tax with respect to such lands. *Estate of Johnson*, 178 Cal. Rptr. 823, 125 Cal.3d. 1044, (1st Dist. Cal.App. 1981), *cert. denied*, 459 U.S. 828 (1982). The Idaho State Tax Commission, in the attached opinion dated June 8, 1982, and the Assistant Attorney General, Tax Division, of the Oregon Department of Justice in the opinion discussed above have agreed with the *Battese* decision.

To be sure, it is unlikely that Congress envisioned such a result when it passed the General Allotment Act in 1887. The expectation at that time was that implementation of the allotment policy would soon result in the disappearance of all Indian reservations. *Montana v. United States*, 450 U.S. 544, 559-560 n.9 (1981). That expectation may explain why Congress did not address jurisdictional issues, but it does not determine how such issues will be resolved today. The courts do not extrapolate legislative intent from such expectations, *Solem v. Bartlett*, 465 U.S. 463, 468-469 (1984), nor are they obliged in ambiguous circumstances to implement an assimilationist policy that Congress has since rejected, *Bryan* at 388-389 n.14 (1976).

Accordingly, we recommend that any claims on behalf of individual Indians that you have not pursued because of our March 22, 1979, memorandum be reevaluated in light of the conclusions in this memorandum.

/s/ Dennis Daugherty
DENNIS DAUGHERTY

Attachments

cc: All Regional Solicitors w/attachments

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mar 22, 1979

Memorandum

To: Field Solicitor, Twin Cities
From: Associate Solicitor, Division of Indian Affairs
Subject: Taxability of Reservation Lands Owned by Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, i.e., that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or at least requires interpretation in light of later

legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

“[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . .”

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, i.e., that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403a-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to “all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians.” That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Cmnr. of Internal Revenue*, 452 F. 2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of non-taxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS

In the Supreme Court of the United States AUG 22 1991

OCTOBER TERM, 1991

OFFICE OF THE CLERK

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether Yakima County may impose an ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

2. Whether Yakima County may impose a state excise tax on the sale of real property on the Reservation by the Yakima Nation or its members.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Introduction and summary of argument	5
Argument:	
Yakima County may not tax lands owned in fee by the Yakima Nation or its members within the boundaries of the Yakima Indian Reservation	8
A. <i>Moe v. Confederated Salish & Kootenai Tribes</i> makes clear that Section 6 of the General Allot- ment Act does not authorize state taxation that is otherwise barred by federal law	8
B. The history of federal statutory policy regard- ing tribal sovereignty, economic independence, and Indian reservations confirms that Section 6 does not authorize state taxation of Indian- owned reservation lands	15
Conclusion	29
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Bates v. Clark</i> , 95 U.S. 204 (1877)	19
<i>Battese v. Apache County</i> , 129 Ariz. 295, 630 P.2d 1027 (1981)	8
<i>Brendale v. Confederated Tribes & Bands of</i> <i>Yakima Indian Nation</i> , 492 U.S. 408 (1989)	2, 5
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	6, 22, 27, 28
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	6, 20, 22, 23
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	16
<i>Confederated Salish & Kootenai Tribes v. Moe</i> , 392 F. Supp. 1297 (D. Mont. 1975)	11
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989)	6
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	12

Cases—Continued:

Page

<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	20
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	19
<i>Duro v. Reina</i> , 110 S. Ct. 2053 (1990)	23
<i>Estate of Johnson</i> , 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. App. 1981), cert. denied, 459 U.S. 828 (1982)	8
<i>Fisher v. District Court</i> , 424 U.S. 382 (1976)	26
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	4, 7, 9
<i>Heff, In re</i> , 197 U.S. 488 (1905)	9
<i>Kennerly v. District Court</i> , 400 U.S. 423 (1971)	20
<i>Kerr-McGee Corp. v. Navajo Tribe</i> , 471 U.S. 195 (1985)	22
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	10, 18
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	6, 7, 18, 23
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	6, 7, 16, 17, 20, 22, 23
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	15
<i>Mississippi Band of Choctaw Indians v. Holyfield</i> , 490 U.S. 30 (1989)	22
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	passim
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	4, 6, 17, 22, 26
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	14
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	6
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe</i> , 111 S. Ct. 905 (1991)	7
<i>Rice v. Olson</i> , 324 U.S. 786 (1945)	15
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962)	10, 21
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	13, 19, 21
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	15, 26
<i>State v. Big Sheep</i> , 75 Mont. 219, 243 P. 1067 (1926)	21
<i>State v. Bush</i> , 145 Minn. 413, 263 N.W. 300 (1935)	21
<i>State v. Johnson</i> , 212 Wis. 301, 249 N.W. 284 (1933)	21
<i>The Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1867) ..	16, 17

Cases—Continued:

Page

<i>The New York Indians</i> , 72 U.S. (5 Wall.) 761 (1867)	17
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	17, 19
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	14, 27
<i>United States v. Morrow</i> , 266 U.S. 531 (1925)	12
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	9
<i>United States v. Ramsey</i> , 271 U.S. 467 (1926)	21
<i>United States v. Rickert</i> , 188 U.S. 432 (1903)	17
<i>Washington v. Confederated Bands & Tribes of Yakima Nation</i> , 439 U.S. 463 (1979)	2
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	6, 7
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	23
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	7, 20
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	16

United States Constitution, treaties, statutes and regulations:

U.S. Const.:

Art. I:

§ 2, Cl. 3	16
§ 8, Cl. 3	15

Art. II,

§ 2, Cl. 2	16
------------------	----

Amend. XIV

Articles of Confederation, Art. IX	15-16
--	-------

Treaty of June 9, 1855, United States-Yakima

Nation of Indians, 12 Stat. 951	2
Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390	3
Act of Dec. 21, 1904, ch. 22, 33 Stat. 595	13
Act of May 8, 1906, ch. 2348, 34 Stat. 182	3
Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 <i>et seq.</i>	3
Act of June 25, 1948, ch. 645, 62 Stat. 757	19
Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1106 (Public Law 81-874) (20 U.S.C. 240(b)(3)(D)-(E)) ..	28
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280)	10, 20, 22

VI

Acts, statutes and regulations—Continued:

Act of Aug. 31, 1964, Pub. L. No. 88-540, § 1, 78 Stat. 747	24
Act of May 24, 1990, Pub. L. No. 101-301, § 1(a), 104 Stat. 206	24
Buck Act, 4 U.S.C. 109	22
Department of Interior and Related Agencies Appropriations Act, Pub. L. No. 101-512, 104 Stat. 1915:	
104 Stat. 1929	27
104 Stat. 1950-1951	27
General Allotment Act of 1887, 25 U.S.C. 331 <i>et seq.</i> :	
§ 5, 25 U.S.C. 348	13
§ 6, 25 U.S.C. 349	<i>passim</i> , 1a
Indian Child Welfare Act of 1978, 25 U.S.C. 1901-1963	22
Indian Financing Act of 1974, 25 U.S.C. 1451 <i>et seq.</i>	22
Indian Gaming Regulatory Act, 25 U.S.C. 2701 <i>et seq.</i>	22
Indian Mineral Development Act of 1982, 25 U.S.C. 2101 <i>et seq.</i>	22
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a <i>et seq.</i> :	
25 U.S.C. 398	22
Indian Reorganization Act of 1934, 25 U.S.C. 461 <i>et seq.</i> :	
§ 1, 25 U.S.C. 461	18
§ 2, 25 U.S.C. 462	18
§ 3, 25 U.S.C. 463	18
§ 5, 25 U.S.C. 465	23, 25
§ 17, 25 U.S.C. 477	25
Indian Reorganization Act Amendment of 1988, Pub. L. No. 100-581, § 213, 102 Stat. 2941	24
Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 <i>et seq.</i>	22
Indian Self-Determination and Education Assistance Amendments Act of 1988, Pub. L. No. 100-472, § 201, 102 Stat. 2288	22

VII

Acts, statutes and regulations—Continued:

Indian Tribal Governmental Tax Status Act, 26 U.S.C. 7871	22
Johnson-O'Malley Act, 25 U.S.C. 452 <i>et seq.</i>	28
Snyder Act, 25 U.S.C. 13	27
Trade and Intercourse Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729	19
18 U.S.C. 1151	5, 19, 20, 21, 23, 26, 27
18 U.S.C. 1151(a)	19, 21
18 U.S.C. 1162	10
25 U.S.C. 177	12
25 U.S.C. 372	13
25 U.S.C. 379	13
25 U.S.C. 404	13
25 U.S.C. 405	13
25 U.S.C. 608	24
25 U.S.C. 608(c)	24
25 U.S.C. 1321-1326	10
25 U.S.C. 1322(a)	22
28 U.S.C. 1360	10, 20
Wash. Rev. Code Ann. (West 1981 & Supp. 1991):	
§ 82.45.060	2
§ 82.45.180	2
§ 84.52.065 (1991 & Supp. 1991)	2
25 C.F.R.:	
Pt. 151	24
Section 151.10(e)	24
Miscellaneous:	
40 Cong. Rec. 3598-3602 (1906)	9
78 Cong. Rec. 11,125 (1934)	18
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942)	18
45 Fed. Reg. (1980):	
p. 62,034	24
p. 62,035	24
H.R. Rep. No. 746, 97th Cong., 2d Sess. (1982)	22
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934)	18
Idaho Tax Comm'n, <i>Taxation of Lands Within Indian Reservations Which Are Owned by Individual Indians</i> (June 8, 1982)	8

VIII

Miscellaneous—Continued:	Page
N.D. Att'y Gen. Op. No. 85-12 (Apr. 11, 1989)	8
1 Op. Sol. of Inter. (1934) :	
p. 426	25
p. 491	25
p. 503	25
<i>Taxation of Indian Fee Land</i> , Letter from Oregon Dep't of Justice to James Manary (Mar. 14, 1983)	8
S. Rep. No. 274, 100th Cong., 1st Sess. (1987)	22
S. Rep. No. 646, 97th Cong., 2d Sess. (1982)	22
S. Rep. No. 1998, 59th Cong., 1st Sess. (1906)	9
19 Weekly Comp. Pres. Doc. 98 (1983)	22
27 Weekly Comp. Pres. Doc. 784 (June 14, 1991)	22
<i>The Federalist</i> No. 42 (J. Cooke ed. 1961)	16

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-408

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION

No. 90-577

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT/CROSS-PETITIONER

INTEREST OF THE UNITED STATES

Numerous Acts of Congress that advance self-govern-
ment and economic independence of Indian tribes support
the traditional immunity of tribes and their members
from state taxation of on-reservation property and activ-
ities. At the Court's invitation, the Solicitor General filed
a brief at the petition stage supporting adherence to that
immunity in this case.

(1)

STATEMENT

1. Respondent Yakima Nation occupies a 1.3 million acre Reservation in the State of Washington. The Reservation was established by an 1855 Treaty, ratified in 1859. 12 Stat. 951. Approximately 80% of the Reservation land is held in trust by the United States for the Yakima Nation or its members. The remainder is owned in fee by the Yakima Nation, individual members, or nonmembers. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415 (1989) (opinion of White, J.); *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 469 (1979).¹

2. This suit was commenced in 1987 by the Yakima Nation against Yakima County and its treasurer. The Yakima Nation sought an injunction barring the County from imposing ad valorem taxes on lands owned in fee by the Nation or its members within the Reservation and from collecting the state excise tax on sales of such lands.² The suit was prompted by a scheduled tax sale of approximately 40 parcels in which individual members of the Yakima Nation held a fee interest and for which taxes were past due. See Pet. App. 7a; J.A. 5.

The district court granted summary judgment for the Yakima Nation. Pet. App. 34a-39a. The court relied largely on *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-481 (1976), which held that Montana could not tax personal property of tribal members situated within a reservation, assess a license fee on an Indian conducting a business on the reservation, or tax on-reservation purchases of cigarettes by tribal members.

In *Moe*, Montana argued that application of the taxes and license fees to at least some Indians was authorized

¹ Approximately 104 members of the Yakima Nation own 139 parcels of fee-patented land. Pet. App. 35a; J.A. 37.

² As amicus State of Washington points out (Br. 2), a substantial portion of the property tax and virtually all of the excise tax are paid into the State's general fund for the support of common schools. See Wash. Rev. Code Ann. §§ 82.45.060, 82.45.180 (West 1981 & Supp. 1991), 84.52.065 (West 1991 & Supp. 1991).

by Section 6 of the General Allotment Act of 1887, as amended in 1906, which provides, *inter alia*, that at the expiration of the trust period for allotments, the Indian allottees "shall * * * be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. 349 (reproduced at App., *infra*, 1a).³ The Court found the State's argument "untenable," explaining that "[i]f the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for all jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478. That result, the Court reasoned, would create an "impractical pattern of checkerboard jurisdiction" and would conflict with the "existing federal statutory law of Indian jurisdiction." *Ibid.* The Court also reasoned that the State's argument overlooked the Court's more recent conclusions about the General Allotment Act's "present effect"—specifically, that although the Act's ultimate purpose was to allot lands to all Indians and abolish reservations, that policy "was repudiated in 1934 by the Indian Reorganization Act [IRA]." 425 U.S. at 479. The Court noted that there was no decisional authority giving the meaning Montana urged to Section 6 "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands," and it therefore declined to sustain the state taxes and license fees on that basis. *Ibid.*

In this case, Yakima County relied on a proviso to Section 6 of the General Allotment Act, which states that if the Secretary of the Interior finds that an allottee is able to manage his affairs, the Secretary may issue the allottee a fee patent prior to expiration of the statutory trust period, and "thereafter all restrictions as to sale,

³ Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182.

⁴ Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*

incumbrance, or taxation of said land shall be removed." Pet. App. 34a. Although that portion of Section 6 was not quoted in *Moe*, the district court found this case to be governed by *Moe*'s conclusions about the present effect of Section 6, in light of the intervening enactment of the IRA and of modern legislation in which Congress "has evinced a clear intent to eschew any such checkerboard approach within an existing reservation." Pet. App. 37a-38a (quoting 425 U.S. at 479). The court therefore held that the proviso to Section 6, like the principal clause quoted in *Moe*, did not grant the County jurisdiction to tax fee lands within the Reservation that are owned by the Yakima Nation or its members. Pet. App. 38a-39a.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-30a. The court acknowledged that a State may not tax Indians on a reservation unless Congress makes its intent to allow such taxation "unmistakably clear." Pet. App. 12a (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). But it believed that the proviso to Section 6 of the General Allotment Act satisfied that test. The court acknowledged that *Moe* furnished the "strongest support" for not construing the proviso to authorize taxation of Indian-owned fee lands in the face of more modern legislation—especially since *Moe* declined to follow *Goudy v. Meath*, 203 U.S. 146 (1906), which had found state taxation of an allotment to be authorized by the language in Section 6 (quoted above) that provides that allottees "shall be * * * subject" to state laws. Pet. App. 13a, 15a. But the court below chose to confine *Moe*'s holding about the present effect of Section 6 to that clause, and not to apply it to the proviso. Pet. App. 15a-17a. Thus, although the court acknowledged *Moe*'s holding that the policies of the General Allotment Act were repudiated by the IRA and that Section 6 does not permit state taxation of Indian property and activities on Indian-owned fee lands on a reservation, it held that Section 6 permits state taxation of the fee lands themselves. Pet. App. 17a-20a, 26a.

The court of appeals also rejected the contention that the ad valorem tax is barred by 18 U.S.C. 1151, which was enacted in 1948 to codify a modern definition of "Indian country" that includes all lands within an Indian reservation, "notwithstanding the issuance of any patent." The court believed that 18 U.S.C. 1151 defines "Indian country" only for purposes of criminal jurisdiction and is "not * * * relevant to the question of whether fee patented land may be taxed by the state." See Pet. App. 20a-21a; *id.* at 24a-26a.⁵

By contrast, the court of appeals held that the excise tax may not be applied to sales of on-reservation fee lands by the Yakima Nation or its members. The court concluded that the proviso to Section 6 authorizes state taxation only of the land itself, while state law imposes the excise tax on the sale of land. Pet. App. 29a-30a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The framework for resolution of cases involving application of state law to matters affecting Indians within a reservation is well established. In many cases—especially those in which a State seeks to apply its laws to non-Indians dealing with Indians—the Court conducts a par-

⁵ Although the court of appeals rejected the Tribe's argument that *Moe* forecloses imposition of the ad valorem tax on Indian-owned fee lands on the Reservation, Pet. App. 23a-27a, it did not actually sustain the tax as applied to such lands. The court noted that this Court had since held in *Brendale* that the Yakima Nation may regulate activities on fee lands owned by non-Indians if their impact is "demonstrably serious" and "imperil[s] the political integrity, economic security or the health and welfare of the tribe." *Id.* at 27a (quoting 492 U.S. at 431 (opinion of White, J.)). Although this case is the converse of *Brendale*—inasmuch as it involves an assertion of state jurisdiction over fee lands owned by Indians—the court believed *Brendale* to be relevant because the Yakima Nation had presented evidence of how the taxation would affect it in a demonstrably serious way. Pet. App. at 27a-28a. The court therefore remanded to the district court with directions to consider that evidence under the standard it drew from *Brendale*. *Id.* at 28a.

ticularized inquiry into the federal, tribal, and state interests at stake. "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 208, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-177 (1989).

By contrast, "[i]n the special area of state taxation of Indian tribes and tribal members" on a reservation, the Court has "adopted a *per se* rule" barring such taxation. *Cabazon*, 480 U.S. at 215 n.17. This rule "recognize[s] that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak." *Ibid.* In short, "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Moe*, 425 U.S. at 475-476 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Although Congress may authorize such taxation, "it has not done so often," and it must make its intention to do so "unmistakably clear." *Cabazon*, 480 U.S. at 215 n.17 (quoting *Blackfeet Tribe*, 471 U.S. at 765). Finally, the relevant statutory framework must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766.

The Court has applied the foregoing principles in holding that States may not tax the reservation income of Indians (*McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973)), Indian-owned vehicles, mobile homes and other personal property within the reservation (*Moe*, 425 U.S. at 475-476, 480; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976)), and on-reservation sales and purchases by tribal

members (*Moe*, 425 U.S. at 475-476, 480; *Colville*, 447 U.S. at 160; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 911 (1991)). It follows *a fortiori* that, in the absence of an Act of Congress expressly so providing, Yakima County does not have jurisdiction to tax real property owned by the Yakima Nation or its members within the Yakima Reservation.⁶ The County concedes as much, and concedes as well that the question must be considered against the backdrop of traditional tribal sovereignty. See Br. 9-10 (citing *McClanahan*, 411 U.S. at 172, and *Williams v. Lee*, 358 U.S. 217, 223 (1959)). But the County argues (Br. 11-27) that application of the ad valorem tax is authorized by Section 6 of the General Allotment Act and *Goudy v. Meath*, 203 U.S. 146 (1906). This argument is foreclosed by *Moe*, which specifically held that—in light of the intervening enactment of the IRA and modern statutes allocating jurisdiction among the federal government, tribes, and States—Section 6 does not authorize a State to tax reservation Indians who have received fee patents to allotments.

The proviso to Section 6, on which the County principally relies, simply provided for removal of those restrictions on alienation and taxation that were imposed on individual parcels by the General Allotment Act itself, and it did so for the purpose of facilitating the breaking up of reservations, dissolution of tribal relations and tribal governments, and integration of Indians into the non-Indian society. Congress has now repudiated both the allotment policy and the goals it was designed to achieve. In the IRA and subsequent statutes, Congress has preserved reservations (including their fee lands) as Indian country, and has sought to solidify tribal relations, promote tribal self-government and economic devel-

⁶ Cf. *McClanahan*, 411 U.S. at 181 ("the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself"); *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148 (there is "no satisfactory authority for taxing Indian reservation lands").

opment, and establish the reservation as the foundation for tribal affairs. Imposition of the taxes at issue here on land owned by the Yakima Nation or its members would frustrate (and is preempted by) these modern statutes and policies, in the same manner as state taxes on other Indian property and activities on reservations. Those taxes are not saved by a vestigial proviso to the General Allotment Act.

Accordingly, courts or agencies in a number of States have concluded that state taxes may not be imposed on Indian-owned fee lands on a reservation. *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981); N.D. Att'y Gen. Op. No. 85-12, Apr. 11, 1985; *Taxation of Indian Fee Land*, letter from Oregon Dep't of Justice (advice letter dated Mar. 14, 1983); Idaho Tax Comm'n, *Taxation of Lands Within Indian Reservations Which Are Owned By Individual Indians* (June 8, 1982); see also *Estate of Johnson*, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. App. 1981), cert. denied, 459 U.S. 828 (1982). There is no reason for a different result here.

ARGUMENT

YAKIMA COUNTY MAY NOT TAX LANDS OWNED IN FEE BY THE YAKIMA NATION OR ITS MEMBERS WITHIN THE BOUNDARIES OF THE YAKIMA INDIAN RESERVATION

A. *Moe v. Confederated Salish & Kootenai Tribes* Makes Clear That Section 6 Of The General Allotment Act Does Not Authorize State Taxation That Is Otherwise Barred By Federal Law

Yakima County's reliance on Section 6 of the General Allotment Act as authorization to tax real property within the Yakima Reservation that is owned by the Yakima Nation or its members is, we submit, foreclosed by this Court's unanimous decision in *Moe v. Confederated Salish & Kootenai Tribes*.

1. In *Moe*, Montana argued that Section 6 authorized it to tax at least some Indian-owned property on the Flat-

head Reservation because it contained some allotted lands that had passed out of trust status. Montana relied on the portion of Section 6, as revised in 1906, which stated that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Montana pointed out that *Goudy v. Meath* had rejected the claim of an Indian patentee that state taxing jurisdiction was not among the "laws to which he and his land had been made subject." 425 U.S. at 477.⁷ "Building on *Goudy* and the fact that the General Allotment Act has never been explicitly 'repealed,'" Montana argued "that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present." *Ibid.* Yakima County's argument here is strikingly similar, because it likewise relies (Br. 12-13, 15, 22-24, 26) on *Goudy* and the fact that Section 6 has never been repealed. As in *Moe*, however, the argument is "untenable." 425 U.S. at 478.

The Court held in *Moe* that Section 6 did not authorize taxation of Indians residing on fee-patented lands, in light

⁷ *Goudy* arose under the original version of Section 6, which contained similar language subjecting allottees to state law. The original version had been construed in *In re Heff*, 197 U.S. 488 (1905), to subject allottees to state law when they first received an allotment and trust patent, rather than later, at the expiration of the trust period. In response to *In re Heff*, the relevant portion of Section 6 was amended in 1906 to provide that allottees would not be subject to state law until the trust period expired. S. Rep. No. 1998, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 3598-3602 (1906). The 1906 amendments also added the proviso to Section 6 that allows the Secretary to issue a fee patent prior to expiration of the trust period.

In re Heff further held that federal laws prohibiting the sale of liquor to Indians were rendered inapplicable when allottees became citizens and subject to state law under Section 6, and it indicated that Congress could not regulate sales of liquor to Indians after that time. This aspect of *In re Heff* was overruled in *United States v. Nice*, 241 U.S. 591 (1916).

of the "federal statutory law of Indian jurisdiction" that eschews such a checkerboard regime of state authority over Indians, 425 U.S. at 478 (citing *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962)), and the IRA's repudiation of both the allotment policy and its goals of abolishing reservations and assimilating Indians into the non-Indian community, 425 U.S. at 478-479 (quoting *Mattz v. Arnett*, 412 U.S. 481, 496 & n.18 (1973)). The Court observed that the State had referred it to no decisional authority—and that it knew of none—giving the meaning the State urged for Section 6 "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands," such as Public Law 280.⁸ See 425 U.S. at 478-479. Thus, *Moe* squarely rejected the contention that the principal clause of Section 6 of the General Allotment Act, and the construction of that clause in *Goudy*, have the present effect of permitting state taxation of matters occurring (or Indians living) on Indian-owned fee lands within a reservation. Because *Goudy*, like this case, involved imposition of Washington's property tax to the Indian-owned fee land itself, *Moe*'s refusal to give Section 6 the meaning Montana urged in reliance on *Goudy* forecloses Yakima County's attempt to impose the state property tax on Indian-owned fee lands on the Yakima Reservation by invoking the language in the principal clause of Section 6 that subjects an allottee to all state "laws" upon expiration of the statutory trust period.⁹

⁸ Pub. L. No. 83-280, 67 Stat. 588, as amended, 18 U.S.C. 1162, 25 U.S.C. 1321-1326, and 28 U.S.C. 1360.

⁹ The County errs in attempting to justify its reliance on *Goudy* and the principal clause portion of Section 6 by arguing (Br. 22-23) that *Moe* does not really stand for the propositions described in the text. It asserts that *Moe* addressed only the question whether Section 6 authorizes taxation of *all* Indians residing on a reservation where a considerable amount of land had been patented in fee, and that Montana did not distinguish for these purposes between Indians residing on fee lands and those residing on trust lands. See also Montana, *et al.* Amici

2. Yakima County seeks to avoid the holding in *Moe*—and to tax the (Indian-owned) fee lands themselves—by relying on the first proviso to Section 6, which was not specifically discussed in *Moe*. The proviso allows the Secretary to issue a fee patent prior to the time when the trust period otherwise would expire (and when the allottee would otherwise become subject to state law under the principal clause of Section 6) if he finds that the allottee is able to manage his own affairs; it then states that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The County argues (Br. 13, 22-24 & n.11) that because the proviso was not quoted in *Moe*, it may be given effect here to authorize state taxation of Indian-owned fee lands on the Yakima Reservation. Contrary to that contention, how-

Br. 22-23; Nat'l Ass'n of Counties Amicus Br. 13. As we have explained in the text, this Court addressed Section 6's application specifically to fee lands. 425 U.S. at 478-479. Similarly, the district court in *Moe* specifically considered and rejected the contention that, by virtue of the language in Section 6 subjecting fee patentees to state laws, those "Tribal members who received fee patents under the terms of the General Allotment Act of 1887 and who continue to reside on the Reservation are subject to all of the tax laws of the State of Montana." *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1316 & n.15 (D. Mont. 1975) (three-judge court); compare *id.* at 1319 n.3 (Smith, J., dissenting on this issue). Montana did argue on appeal that it could impose the taxes in question on all Indians on the reservation; but relying on *Goudy* and the language of Section 6 quoted above, it also challenged the district court's holding "that not even those individual Indians receiving fee patents under the General Allotment Act are subject to the jurisdiction of the State." 74-1656 & 75-50 Appellants'/Cross Appellees' Br. 16-17; see generally *id.* at 14-17; Reply Br. 4-5; 74-1656 J.S. 11-12. And the State of Washington, in its reply brief as amicus curiae in *Moe* (at 5), likewise relied on Section 6 in arguing that upon expiration of the trust period, Indians came under the authority of the State, including the "taxing jurisdiction * * * established by *Goudy v. Meath*." Thus, *Moe* squarely considered and rejected the contention that the principal clause of Section 6 and *Goudy* permit state taxation of Indians based on the fee status of reservation lands.

ever, the reasoning of *Moe* applies to *all* of Section 6, including its proviso. Indeed, one would expect invalidity of the ad valorem tax on real property to follow *a fortiori* from *Moe*, because the immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); 25 U.S.C. 177. Yet the County not only claims the right to tax such lands, even though it concededly cannot impose any *other* taxes on reservation Indians; the County also claims the right to dispossess the Indians of their fee lands through tax sales, as it planned to do with respect to a number of parcels when this suit was filed. The proviso to Section 6 does not support so extraordinary and anomalous a result.

In the first place, if the principal clause of Section 6 is insufficient, in light of subsequent Acts of Congress, to authorize state taxation of Indian property and transactions within a reservation's boundaries (as the Court held in *Moe*), a mere proviso to that clause likewise must be insufficient as well. Cf. *United States v. Morrow*, 266 U.S. 531, 534-535 (1925) (a proviso is presumed to be confined to the subject matter of the principal clause). That construction is reinforced by the limited purpose of the proviso: to accelerate the date on which land passed out of trust status, if the allottee was prepared to receive a fee patent prior to the time (referred to in the principal clause of Section 6) when the trust period otherwise would expire. There is nothing in Section 6, in subsequent Acts of Congress, or in common sense, to suggest that parcels that passed into fee status more quickly pursuant to the proviso should be treated differently from other reservation fee lands for purposes of the *current* statutory framework governing jurisdiction over Indian reservations that the Court found controlling in *Moe*. To the contrary, the result would be a variant of the "checkerboard" pattern of state taxing jurisdiction the Court rejected in *Moe*: some Indian-owned fee lands on the Reservation would be subject to taxation by

the State while others would not, and the difference would turn on decades-old transactions that have no relevance to current Indian policy.¹⁰

Moreover, it is only the principal clause of Section 6, which was invoked in *Goudy* but found insufficient in *Moe*, that in terms affirmatively makes state law applicable: it provides that the allottee "shall * * * be subject to" state law when a fee patent is issued at the expiration of the trust period. By contrast, the proviso states only that all "restrictions" on sale, incumbrance and taxation shall be "removed" when a fee patent is issued at an earlier time. The restrictions referred to obviously are those imposed on a parcel-by-parcel basis by the General Allotment Act itself, which, by specifying that an allotment was to be held in "trust" (§ 5, 25 U.S.C. 348), pro-

¹⁰ In this case, the record does not show which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period, as contemplated by the principal clause of Section 6 (which under *Moe* does not authorize state taxation of Indian property). There also are a number of other statutes under which trust lands might have passed into fee status, statutes that do not contain the necessary express authorization of state taxation if the fee land is owned by Indians. For example, on many reservations, surplus lands not needed for allotment were opened for settlement by non-Indians. See, e.g., *Solem v. Bartlett*, 465 U.S. 463, 466-467 (1984). If a tribe or its members has repurchased any such lands within the reservation, they would not be subject to state taxation in the absence of a specific authorization by Congress. There is no such authorization in the surplus land Act applicable to the Yakima reservation. See Act of Dec. 21, 1904, ch. 22, 33 Stat. 595. There likewise is no such authorization in the statutes permitting the Secretary to: issue fee patents to the heirs of a deceased allottee (25 U.S.C. 372), partition allotments and issue fee patents to heirs (25 U.S.C. 379), or sell allotments upon the petition of an allottee or his heirs or on behalf of an incompetent Indian (25 U.S.C. 404, 405). This complex web of statutory provisions governing Indian lands further demonstrates the anomalies and checkerboard pattern of taxing jurisdiction inherent in the County's reliance on a vestigial provision of the General Allotment Act that happens to refer to the removal of restrictions on "taxation."

tected the individual allottee by protecting his or her property from alienation, incumbrance and taxation pursuant to state law. See *United States v. Mitchell*, 445 U.S. 535, 543-544 (1980). The removal of those "restrictions" imposed by the General Allotment Act does not remove *other* barriers to state taxation; in particular, it does not override the general principles of preemption, confirmed by more modern legislation and decisions of this Court, that bar extension of state laws (especially state tax laws) to Indians and their property within a reservation. See pages 6-7, *supra*.¹¹

Put another way, the proviso's removal of the General Allotment Act's "restrictions" permits taxes to be imposed by any government that otherwise has jurisdiction to do so. Thus, if the land is situated outside the Yakima Reservation, Yakima County and the State of Washington may impose whatever taxes state and federal law allow, even if the land is owned by an Indian.¹² But the proviso obviously does not, for example, confer jurisdiction on King County or the State of Oregon, as a matter of either state or federal law, to tax fee lands in Yakima County. Similarly here, if the land is located within the Yakima Reservation and is owned by the Yakima Nation or one of its members, the land remains, as a matter of

¹¹ Because the vast majority of fee patents issued pursuant to the proviso to Section 6 no doubt *preceded* the statutes and judicial decisions upon which the Court relied in *Moe* in holding that the principal clause of Section 6 does not authorize state taxation of Indian property on a reservation, the "restrictions" imposed by those statutes and decisions could not have been "removed" by issuance of a fee patent pursuant to that proviso.

¹² The County therefore errs in characterizing the argument against state taxation to be that the proviso to Section 6 has been "repealed," and in arguing that repeals by implication are disfavored. See Br. 16, 24 (citing *Morton v. Mancari*, 417 U.S. 535 (1974)). No repeal is involved here, by implication or otherwise. The 1906 proviso to Section 6 remains in force, and any lands for which fee patents issued remain in fee status (absent reacquisition in trust). If that land is outside an Indian reservation, or held by a non-Indian, it may still be taxed pursuant to the proviso.

federal law, beyond the taxing jurisdiction of the State and its political subdivisions. Instead, within the Reservation, Section 6's removal of the General Allotment Act's restrictions on taxation of allotments has the effect of permitting a property tax to be levied by the *Tribe*, which has inherent jurisdiction, protected by federal law, over its own lands and affairs, as well as those of its members. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).¹³

B. The History Of Federal Statutory Policy Regarding Tribal Sovereignty, Economic Independence, And Indian Reservations Confirms That Section 6 Does Not Authorize State Taxation Of Indian-Owned Reservation Lands

For the reasons explained in point A, *Moe* controls this case and requires rejection of the County's efforts to tax Indian-owned land on the Yakima Reservation. If there could be any doubt, however, it is erased by the history of the Indian policies to which the Court referred in *Moe*.

1. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). The policy is embodied in the Constitution, which grants Congress alone the power "To regulate Commerce * * * with the Indian Tribes." Art. I, § 8, Cl. 3. This Clause represents a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under Article IX of the Articles of Confederation, which granted Congress "the sole and exclusive right and

¹³ The proviso on which the County relies does not, of course, even mention States. Accordingly, even on its own terms, it does not imply that a State must have taxing jurisdiction when the General Allotment Act's restrictions are lifted. On the other hand, allotted lands (and income derived from them) do become subject to *federal* taxes when they are no longer in trust status, even if they are within a reservation. *Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956).

power of regulating * * * the trade and managing all affairs with the Indians," but preserved "the legislative right of any State within its own limits." See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1832); *The Federalist* No. 42, at 294 (J. Madison) (J. Cooke ed. 1961). So too, the Constitution confers on the President, with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), and "by declaring treaties already made, as well as those to be made, to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties." *Worcester*, 31 U.S. (6 Pet.) at 559. Against this background, the Court held in *Worcester* that "[t]he Cherokee nation * * * is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561.

Although *Worcester* concerned state criminal jurisdiction over Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan*, 411 U.S. at 169. Indeed, exemption from taxation has long epitomized the distinct character of the Indian tribes within their own territory. This principle, too, is embodied in the Constitution, which excludes "Indians not taxed" from the enumeration upon which apportionment of Representatives and direct taxes is based. Art. I, § 2, Cl. 3; Amend. XIV. Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Court held that Indian lands held in severalty or in common were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' * * * separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." *Id.* at 755; see also *id.*

at 756-757, 758-759.¹⁴ The Court likewise invalidated state taxes on reservation land owned by a tribe in fee in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), terming the taxes and related provisions "extraordinary" and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 766, 770, 771. "[T]his Court has never wavered from the views expressed in these cases," where essential tribal relations have remained intact on a reservation. *Blackfeet Tribe*, 471 U.S. at 765.¹⁵

2. With the enactment of the General Allotment Act in 1887, a "new policy" for a time "found expression in the legislation of Congress—a policy which look[ed] to the breaking up of tribal relations," "put[ting] an end to tribal organization" and to "dealings with Indians * * * as tribes," abolishing reservations, and "establishing of the separate Indians in individual homes." *United States v. Celestine*, 215 U.S. 278, 290 (1909). Allotments were held in trust to prepare individual Indians for assimilation and self-sufficiency, and they accordingly were exempt from state taxation as instrumentalities of the United States during this step toward accomplishing the ultimate goals of the General Allotment Act. See *United States v. Rickert*, 188 U.S. 432, 437 (1903). Passage of an allotment from trust into fee status was another such step, with the intended consequence of both subjecting the individual Indian to state tax and other laws and further attenuating his tribal relations.

3. Congress once again changed course dramatically in the middle third of this Century. Enactment of the

¹⁴ Although the parcels held in severalty could not be alienated without the approval of the Secretary of the Interior (72 U.S. (5 Wall.) at 753), the Court did not rely on that fact in finding the lands immune from state taxation.

¹⁵ By contrast, the doctrine of Indian sovereignty "has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *McClanahan*, 411 U.S. at 171.

IRA in 1934 "repudiated" the policies of the General Allotment Act, which had caused much reservation land to pass out of trust status. *Moe*, 425 U.S. at 479 (quoting *Mattz*, 412 U.S. at 496); see F. Cohen, *Handbook of Federal Indian Law* 216 (1942). Section 1 of the IRA prohibited further allotments; Section 2 extended indefinitely the trust period of existing allotments; and Section 3 provided for restoration of surplus lands on reservations to tribal ownership. 25 U.S.C. 461, 462 and 463. But the IRA did much more. It also sought to reinvigorate tribal relations, enhance the authority of the tribes within their reservations, restore the national policy of dealing with the Indians as tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11,125 (1934) (Sen. Wheeler)).

The most relevant effect of the IRA for present purposes was to reinstate the basis for the broad immunity from state taxation that *The Kansas Indians* and *The New York Indians* had recognized for Indian lands within a reservation. The justification for the limited restriction on state taxation afforded trust allotments under the General Allotment Act had been the supposed incompetence of the allottee; and the premise for removing that restriction had been that the individual Indian was prepared for assimilation and the severing of his tribal relations—i.e., that the purpose of the federal instrumentality created by the General Allotment Act was accomplished. The removal of that narrow restriction applicable to individual parcels does not speak at all to the distinct immunity of the tribal community from state taxation, which has been consistently recognized by this Court, from *The Kansas Indians*, through *McClanahan*, *Moe*, *Itasca County*, *Colville*, and *Blackfeet Tribe*. The latter immunity not only shields the individual Indian; it also respects and promotes the sovereignty and economic independence of the tribe. The Court made this

very point in *Moe* when it explained why the Tribe had standing to sue, noting that "the substantive interest which Congress has sought to protect is tribal self-government," which exists "apart from the monetary injury asserted by the individual Indian[s]." 425 U.S. at 469 n.7. And the Court specifically noted in *Moe* that the basis for the tax immunity it recognized was not the federal instrumentality doctrine, on which *Rickert* (and the General Allotment Act) rested, but "that which *McClanahan* identified, i.e., that state taxing jurisdiction has been pre-empted by the applicable treaties and federal legislation." 425 U.S. at 474 n.13.

4. At the time of the General Allotment Act and the IRA, and up to 1948, there was no statutory definition of the term "Indian country," which identifies the territory in which matters affecting Indians are under the exclusive jurisdiction of the tribes and the United States, to the exclusion of the States.¹⁶ During that period, "Indian country" was generally thought to include only land owned by Indians, usually with the title held in trust by the United States. When Indian ownership ended, the land was no longer part of Indian country. *Bates v. Clark*, 95 U.S. 204, 209 (1877); *Celestine*, 215 U.S. at 285; *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In 1948, Congress enacted a statutory definition of "Indian country" in 18 U.S.C. 1151¹⁷ that for the first time defined it to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. 1151(a) (emphasis added). The Court described the effect of this enactment in *Solem v. Bartlett*, 465 U.S. at 468:

¹⁶ The term "Indian country" had last been defined in Section 1 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729. That provision, however, was not included in the Revised Statutes and was therefore repealed. *Donnelly v. United States*, 228 U.S. 243, 268 (1913).

¹⁷ Act of June 25, 1948, ch. 645, 62 Stat. 757.

The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. * * * Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.

This expansion of "Indian country" makes clear that Indians enjoy self-government, free from state control, on all land (both fee and trust) within their reservations. It therefore establishes a firm statutory basis for applying the rule of immunity of *The Kansas Indians* and its progeny to fee lands owned by Indian tribes and their members within an existing reservation.

The court of appeals believed—and the County concurs (Br. 34-35)—that Section 1151 applies only to criminal cases and "is not * * * relevant to the question of whether fee patented land may be taxed by the state." Pet. App. 20a-21a. That plainly is not the law. "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (citing *McClanahan*, 411 U.S. at 177-178 n.17; *Kennerly v. District Court*, 400 U.S. 423, 424 n.1 (1971); and *Williams v. Lee*, 358 U.S. at 220-222 & nn. 5, 6, 10); accord, *Cabazon*, 480 U.S. at 207 n.5.¹⁸ Indeed, in this respect as well, the County's position cannot be reconciled with *Moe*. There, in holding that the State could not tax Indians on fee land, the Court relied on its conclusion in *Seymour v. Superintendent* that a checkerboard pattern of criminal jurisdiction, turning on the ownership of parcels of land within a reservation, was "contrary to the intent embodied in the existing federal statutory law of

¹⁸ The definition of "Indian country" in Section 1151 also governs the allocation of civil adjudicatory jurisdiction under Public Law 280. See 28 U.S.C. 1360. As a result, it would be virtually impossible for a State to enforce its tax laws against land owned by an Indian within a reservation unless it acquired civil jurisdiction pursuant to Public Law 280. See *Kennerly v. District Court*, 400 U.S. at 426-427.

Indian jurisdiction." 425 U.S. at 478. At the cited page in *Seymour*, the Court in turn relied on what it termed "the plain language of § 1151," in which "Congress specifically sought to avoid" such confusion. 368 U.S. at 358.

The change wrought by the enactment of Section 1151 was perhaps most marked, at least initially, in the area of criminal law. Thus, prior to 1948, it was generally understood that the States had criminal jurisdiction over Indians on fee lands within an Indian reservation. See, e.g., *State v. Big Sheep*, 75 Mont. 219, 230-233, 243 P. 1067, 1071 (1926);¹⁹ *State v. Johnson*, 212 Wis. 301, 307-312, 249 N.W. 284, 287-288 (1933); *State v. Bush*, 145 Minn. 413, 418-419, 263 N.W. 300, 303 (Minn. 1935).²⁰ Indeed, Section 6 of the General Allotment Act itself provided for application of state law, both criminal and civil, to Indians who received patents in fee at the expiration of the trust period. After enactment of 18 U.S.C. 1151(a), those prior judicial rulings and Section 6 were no longer effective to confer criminal jurisdiction. This led to the situation described in *Solem*, 465 U.S. at 467, in which the allocation of criminal jurisdiction turns on reservation boundaries, not the fee or trust status of land, even though that result plainly was not envisioned when the General Allotment Act was passed in 1887 and amended in 1906. The situation regarding taxing and other civil jurisdiction, at issue here, is the same.

5. As this Court has recognized, since the enactment of the IRA, Congress has enacted numerous other stat-

¹⁹ See 75 Mont. at 234, 293 P. at 1071:

Lands to which the United States has parted with title, and over which it no longer exercises control, even if within the exterior boundaries of the reservation, are not deemed a part of the reservation. All other lands within the reservation boundaries are.

²⁰ This Court's decision in *United States v. Ramsey*, 271 U.S. 467 (1926), confirms as much. It held that land allotted in fee to an Indian on a reservation, but subject to restrictions on alienation, was "Indian country" because of the restrictions. There would have been no significant issue worthy of this Court's review if the land in *Ramsey* had not been restricted.

utes designed to strengthen tribal self-government and economic independence on reservations set apart from state jurisdiction.²¹ As the Court pointed out in *Cabazon*, these substantial federal interests were reaffirmed by President Reagan's 1983 Statement on Indian Policy, which stressed "that tribes [must] reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government." 480 U.S. at 217 & n.20 (quoting 19 Weekly Comp. Pres. Doc. 98, 99 (1983)); see also *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985). More recently, President Bush issued a similar statement reaffirming the government-to-government relationship between the United States and Indian tribes (which he described as the "cornerstone" of "the administration's policy of fostering tribal self-government and self-determination") and endorsing tribal administration of programs pursuant to the Self-Determination Act. 27 Weekly Comp. Pres. Doc. 784 (June 14, 1991). These important federal policies, which have been recognized by all three Branches of the Federal Government, fully support the traditional immunity of lands (and other property) owned by an In-

²¹ See, e.g., *Blackfeet Tribe*, 471 U.S. at 767 n.5 (Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, which does not subject tribal royalties to the pre-IRA authorization of state taxes in 25 U.S.C. 398); *Cabazon*, 480 U.S. at 216 n.19, 217-218, and *Itasca County*, 426 U.S. at 389 n.14 (both citing the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. *et seq.*); *McClanahan*, 411 U.S. at 176-177 (citing Buck Act's protection against state taxes (4 U.S.C. 109) and requirement of tribal consent for assumptions of jurisdiction by a State under Public Law 280 (see 25 U.S.C. 1322(a)); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44-45, 49, 52 (1989) (Indian Child Welfare Act of 1978, 25 U.S.C. 1901-1963). See also 25 U.S.C. 2701 *et seq.* (Indian Gaming Regulatory Act); 26 U.S.C. 7871 (Indian Tribal Governmental Tax Status Act, discussed in S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982)); Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.*, discussed in H.R. Rep. No. 746, 97th Cong., 2d Sess. 3-5, 8, 10-11 (1982)); S. Rep. No. 274, 100th Cong., 1st Sess. 4 (1987) (discussing 1988 amendments to Indian Self-Determination and Education Assistance Act, Pub. L. No. 100-472, § 201, 102 Stat. 2288).

dian tribe and its members within their reservation—the fulcrum for achieving the "overriding goal" of "tribal self-sufficiency and economic development." *Cabazon*, 480 U.S. at 216.

In sum, Yakima County's narrow focus on the fact that some fee lands on the Yakima Reservation were once allotted to individual Indians, and then passed into fee status pursuant to the proviso to Section 6 of the General Allotment Act, ignores the "significant geographic component" of tribal sovereignty that now undergirds preemption analysis in this area. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); compare *McClanahan*, 411 U.S. at 170-171, with *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-150. For, as this Court recently reaffirmed in *Duro v. Reina*, 110 S. Ct. 2053, 2060 (1990)—citing *Moe*—state taxation of tribal members on the reservation "would interfere with internal governance and self-determination."

6. The County cites several federal statutes which, in its view, nevertheless indicate that States may tax reservation land held in fee by Indians. For example, the County notes (Br. 14-15) that Section 5 of the IRA, 25 U.S.C. 465, permits the Secretary of the Interior to take land in trust for Indians, both on and off a reservation, and that the land then is free from taxation; from this the County infers that land on a reservation that is owned in fee by an Indian must be subject to state taxes. That inference is a *non sequitur*. The trust status of the land concededly is important as a bar to state taxation of land outside the boundaries of a reservation, and the wording of Section 5 may be explained on that ground alone. Furthermore, although the IRA was an important step in the re-invigoration of reservations and tribes, it did not expand the concept of Indian country to include all land within the boundaries of a reservation; that expansion did not occur until 18 U.S.C. 1151 was enacted in 1948. It therefore is understandable that Congress might have thought it advisable in 1934 to provide for the taking of *all* land in trust (and expressly to exempt it from state taxation) both inside and outside the res-

ervation. Moreover, the Secretary has since promulgated regulations governing the taking of land in trust for Indians, 25 C.F.R. Pt. 151, and one of the factors to be considered is "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. 151.10(e). Contrary to the County's suggestion (Br. 20-21), the preamble makes it clear that the focus of this provision was on land *outside* of a reservation. See 45 Fed. Reg. 62,034, 62,035 (1980).²²

The County also relies (Br. 17-18) on a special statute authorizing land transactions affecting Yakima land. 25 U.S.C. 608 (1988). That statute, however, supports our position, not the County's. As amended in 1964, it provided for acquisition of land for the Yakima Nation both within the Reservation and within the far larger area ceded by the Yakimas to the United States under the Treaty of June 9, 1855. See J.A. 24 (map). As amended in 1964, Section 608(c) provided that when land that is not in trust status is purchased for the tribes, title must be taken in fee and the land "shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington."²³ Pub. L. No. 88-540, § 1, 78 Stat. 747. That assurance presumably was especially important because of the potential for purchases within a vast ceded area outside the Reservation. Moreover, as applied to fee land inside the Reservation, the presence of the express provision that land so acquired shall not be exempt from state taxation

²² The preamble states (45 Fed. Reg. at 62,035) (emphasis added):

Many objections were received about the acquisition of fee lands in trust status. These comments primarily concerned the erosion of tax base and the serious jurisdictional problems that can arise *when land outside of reservation* is acquired in trust status.

²³ As the County points out (Br. 18), 25 U.S.C. 608 was amended in 1988 and 1990 to provide that all land purchased for the Yakima Nation must be taken in trust. Pub. L. No. 100-581, § 213, 102 Stat. 2941; Pub. L. No. 101-301, § 1(a), 104 Stat. 206.

by virtue of tribal ownership implies that the land *would* be exempt from taxation in the absence of that provision. The County's claim in this case, of course, is based, not on any alleged acquisitions of lands under this special statute, but on Section 6 of the General Allotment Act.

7. Finally, the County and certain of its amici rely on statements in various government sources to the effect that, by virtue of the principal clause of Section 6 of the General Allotment Act, allotments were exempt from state taxation during the trust period or that States could tax Indian-owned fee land when the trust period expired. Most of those statements, however, do not distinguish between on- and off-reservation lands, and most predated (or concern events that predated) the IRA, the 1948 expansion of "Indian country" to include all land within the boundaries of a reservation, and other modern statutes affecting Indians. See, e.g., Pet. Br. 19; LaPlata County, *et al.* Br. 3-26. They accordingly add nothing to the text of Section 6 itself, which subjected allottees to state laws and removes the restrictions on taxation imposed by the General Allotment Act when a fee patent issued. They therefore are irrelevant to the distinct question, resolved in *Moe*, concerning the *present* effect of Section 6 on Indian reservations, in light of the more recent enactments that reinstate the premises for the traditional immunity of Indian property from state taxation.²⁴

²⁴ The State of Washington cites (Br. 9-11) three opinions issued by Solicitor Margold in 1934, immediately after enactment of the IRA. The first stated that the IRA did not divest the Secretary of his authority to issue fee patents to allottees and therefore has no relevance to the tax question. 1 Op. Sol. of Inter. 426 (1934). The second indicated that property owned by a tribal corporation organized under Section 17 of the IRA might be *immune* from state taxation; it therefore obviously does not support the County here. 1 Op. Sol. of Inter. 491. The third opinion simply raised (but did not resolve) policy questions about taking land in trust pursuant to Section 5 of the IRA, inquiring whether it was the purpose of the Indian Office to eliminate state taxation of all Indian lands that were then taxable. 1 Op. Sol. of Inter. 503, 504. Solicitor Margold did not identify what property he believed *was* taxable at that time or distinguish between on- and off-reservation property. Moreover, these prelimi-

The County places considerable reliance (Br. 19-20) on *Squire v. Capoeman*, 351 U.S. 1 (1956), which held that the federal capital gains tax does not apply to proceeds from the harvesting of timber on allotments. The IRS had contended that it could tax income generated by trust allotments issued under the general Allotment Act, claiming that the implication of the proviso to Section 6 that taxes may not be assessed until a fee patent issued referred to state and local, not federal, taxation. The Court rejected this view, and found a congressional intent "to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee." 351 U.S. at 8.²⁵ That passage, however, has little to do with this case. As an historical matter, the substance of the government's position in *Squire v. Capoeman* was correct. As we have explained, at the turn of the Century, Congress considered "Indian country" to coincide with land held in trust or under restrictions against alienation; and when the trust or restricted status terminated, the land would be taxable by the States. The intent of Congress in 1906 therefore certainly was focused on state and local taxation. That intent, however, could not anticipate, much less override, the enactment of the IRA, 18 U.S.C. 1151, and other modern statutes affecting Indians.²⁶

nary thoughts in the unsettled period immediately following enactment of the IRA occurred well before the codification of the expanded definition of "Indian country" in 1948, which placed in statutory form the preemptive principles on which the Court relied in *Moe*. In any event, the Court has not hesitated to find immunity from state taxing or other jurisdiction despite contrary administrative interpretations or judicial practices. See, e.g., *Blackfeet Tribe*, 471 U.S. at 768 n.7; *Fisher v. District Court*, 424 U.S. 382, 390 (1976).

²⁵ The county ignores the word "only" in the quoted passage. That word is crucial, because it indicates that issuance of a fee patent is a necessary condition for state taxation, but does not suggest that it is a *sufficient* condition—especially where, as here, there are independent federal-law barriers.

²⁶ The lumbering and taxation at issue in *Capoeman* occurred in 1943, before the definition of Indian country was expanded by 18

The County likewise relies (Br. 20) on *United States v. Mitchell*, 445 U.S. 535 (1980), where the government and the Court agreed that the purpose of holding allotments in trust for Indians under the General Allotment Act was to afford an immunity from state taxation during the trust period. This statement is plainly correct, and the fact that, under modern legislation, immunity from state taxation is *also* found where Indian property is within a reservation, does not alter that purpose. The government's position in *Mitchell* therefore has no bearing on the present case.

8. Although the County and its *amici* assert that the effects of affirming the immunity of Indian-owned land on a reservation from state taxation will be devastating, the parties' stipulation shows otherwise. That stipulation states that in 1987, only \$10,718.75 in state and local ad valorem taxes were levied against the Yakima Nation. Although the taxes levied against individual Indians are not set out, based on the assessed valuation of the land, they likewise are not very substantial. J.A. 36-37. By contrast, the United States contributes substantial funds to the school districts on the Reservation: \$871,102 to the Mt. Adams School District, \$2,859 to the Union Gap School District, \$1,232,205 to the Wapato School District, \$705,204 to the Toppenish School District and \$238,706 to the Granger School District. J.A. 41-42.²⁷ While the

U.S.C. 1151. Furthermore, at the time *Capoeman* was decided, there was substantial uncertainty about the taxability of non-trust property owned by Indians within the boundaries of a reservation. *Itasca County*, 426 U.S. at 391 ("[there was] a general uncertainty in 1953 of the precise limits of state power to tax reservation Indians respecting other than their trust property"); see also 426 U.S. at 392 n.16.

²⁷ The United States contributes substantial sums for the benefit of Indians on a nationwide bases. For fiscal year 1991, appropriations for programs authorized principally by the Snyder Act, 25 U.S.C. 13, totaled \$1,326,997,000 for the Bureau of Indian Affairs, and \$1,418,600,000 for the Indian Health Service (with an additional \$167,279,000 for IHS facilities). Pub. L. No. 101-512, 104 Stat. 1929, 1950-1951. Moreover, we have been informed by the

County's loss as a result of being unable to tax Indian-owned fee within the Reservation lands is relatively insignificant, the potential harm to Indian Tribes is great "if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation." *Itasca County*, 426 U.S. at 388-389 n.14. It is, of course, for Congress ultimately to balance the needs and equities, and to determine whether state taxation should be authorized.

Even if the applicable statutory framework here were ambiguous, the courts "are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Itasca County*, 426 U.S. at 388-389 n.14. But however that may be, as we have explained, the Court in fact has already held that Section 6 of the General Allotment Act, on which the County rests its entire case, does *not* have the present effect of authorizing state taxation of reservation Indians, in light of the intervening enactment of the IRA, modern jurisdictional statutes, and numerous measures designed to further tribal self-government and economic development.²⁸

Department of the Interior that \$430,000,000 in funding for housing and related programs were made available through the Department of Housing and Urban development, and that \$24,931,000 were appropriated under the Johnson-O'Malley Act, 25 U.S.C. 452 *et seq.*, for contracts with local school districts to provide supplemental educational services for Indian children. The latter funds are in addition to impact aid for local school districts (such as that itemized in the text) under Pub. L. No. 81-874, 64 Stat. 1106, 20 U.S.C. 240(b)(3)(D)-(E).

²⁸ The County also challenges (Br. 36-37) the court of appeals' holding that it may not levy an excise tax on the sale of land owned by the Yakima Nation or one of its members on the Reservation, because that tax has not been authorized by Congress. But the County admits (Br. 36) that the tax is imposed on the seller, and it does not point to any statute in which Congress has expressly authorized such taxation. The holding below therefore represents a routine application of the settled principle that in the absence of

CONCLUSION

The judgment of the court of appeals should be vacated insofar as it concerns the ad valorem tax, and the case should be remanded with instructions to affirm the judgment of the district court on that issue. The judgment of the court of appeals should be affirmed insofar as it concerns the excise tax (see note 28, *supra*).

Respectfully submitted.

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express congressional authorization, the States may not tax an Indian with respect to his on-reservation transactions. The County suggests that an excise tax on land is akin to a state tax on cigarettes sold by Indians to non-Indians, which *Moe*, *Colville* and *Potawatomi* have required a tribe or tribal member to collect. In those cases, however, the incidence of the tax was on the non-Indian purchaser, and the Court relied on the fact that the Indians were essentially selling their tax exemption and assisting non-members to evade a duty to pay. See *Moe*, 463 U.S. at 481-483. Plainly no such considerations apply here.

APPENDIX

Section 6 of the General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182, and as codified at 25 U.S.C. 349, provides:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And Provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

2

No. 90-408

Supreme Court, U.S.

FILED

OCT 5 1990

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CLERK

In The
Supreme Court of the United States
October Term, 1990

COUNTY OF YAKIMA and DALE A. GRAY,
YAKIMA COUNTY TREASURER,

v.

Petitioners,

CONFEDERATED TRIBES AND
BANDS OF THE YAKIMA NATION,

Respondent.

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA,
MONTANA, NEBRASKA, NEVADA, NEW MEXICO,
NORTH DAKOTA, OREGON, SOUTH DAKOTA,
UTAH, AND WASHINGTON IN SUPPORT OF PETI-
TION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIR-
CUIT

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT	6
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Assiniboine and Sioux Tribes v. Montana, No. CV-89-271-BLG (D. Mont.)	4
Blackfeet Tribe v. Adams, No. CV-89-100-GF (D. Mont.)	4
Bordeaux v. Hunt, 621 F. Supp. 637 (D.S.D. 1985), aff'd sub nom. Nichols v. Rysavy, 809 F.2d 1317 (8th Cir.), cert. denied, 484 U.S. 848 (1987)	1
Brendale v. Confederated Tribes and Bands of Yakima Nation, 109 S. Ct. 2994 (1989) ..	7, 8, 9, 10, 11
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	6, 7
Choate v. Trapp, 224 U.S. 665 (1912)	3
County of Mahnomen v. United States, 319 U.S. 474 (1943)	3
Cross v. Washington, No. 89-35224 (9th Cir.)	4
Goudy v. Meath, 203 U.S. 146 (1906)	4
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976)	6, 7, 10
Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)	7
Squire v. Capoeman, 351 U.S. 1 (1956)	1, 6
United States v. Mitchell, 445 U.S. 535 (1980)	4
United States v. South Dakota, No. 90-301 (D.S.D.)	4

TABLE OF AUTHORITIES - Continued

Page

United States v. Wheeler, 435 U.S. 313 (1978)	8
Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463 (1979)	9

STATUTES

General Allotment Act, § 6, 24 Stat. 390 (1887) (codified as amended at 25 U.S.C. § 349)	1
Act of May 8, 1906, 34 Stat. 182	1
Act of June 21, 1906, 34 Stat. 325	2
Indian Reorganization Act of 1934, 25 U.S.C. § 461	5

CONGRESSIONAL REPORTS

S. Rep. No. 1998, 59th Cong., 1st Sess. 2 (1906)	3
H.R. Rep. No. 1804, 73rd Cong., 2d Sess. 6 (1934)	5

ADMINISTRATIVE DECISIONS

50 L.D. 691, 694 (1924)	2
-------------------------------	---

MISCELLANEOUS

F. Cohen, <i>Handbook of Federal Indian Law</i> 259 (1942)	2
II F. Prucha, <i>The Great Father</i> 869 (1984)	5
United States Dep't of Interior, <i>Federal Indian Law</i> 859 (1958)	2

Amici curiae states of California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Washington, through their respective Attorneys General, respectfully submit a brief in support of the petition for writ of certiorari herein pursuant to Sup. Ct. R. 37.5.

INTEREST OF AMICI CURIAE

It has long been accepted that the first proviso to section 6 of the General Allotment Act of 1887¹ constitutes federal consent to the taxation of lands patented in fee to tribal members under such statute. *E.g., Squire v.*

¹ Section 6 of the General Allotment Act, 24 Stat. 390, 392 (1887) (codified as amended at 25 U.S.C. § 349), originally provided in part "[t]hat upon completion of said allotments and the patenting of lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside[.]" The first proviso, which expressly addresses the tax status of fee-patented lands, was added by the Act of May 8, 1906, 34 Stat. 182, 183: "Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to the sale, encumbrance, or taxation of said lands shall be removed and said lands shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent[.]" See *Bordeaux v. Hunt*, 621 F. Supp. 637, 639 (D.S.D. 1985), *aff'd sub nom. Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987) (discussing adoption of the 1906 amendment). Section 6 has not since been amended.

Capoeman, 351 U.S. 1, 7-8 (1956) ("[t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee"); 50 L.D. 691, 694 (1924) ("[w]hen an allottee voluntarily applies for a removal of restrictions [by requesting issuance of a fee patent] prior to the expiration of the period of exemption originally provided for, the granting of such application subjects those lands to taxation even in the hands of the original allottee"); see generally F. Cohen, *Handbook of Federal Indian Law* 259 (1942) ("[s]hould [an allottee] . . . apply for the issuance of a fee patent and be accorded one pursuant to law [under the General Allotment Act], there seems no reason to believe that his lands would not thereby be subject to state taxation"); United States Dep't of Interior, *Federal Indian Law* 859 (1958) (same). The Court accordingly construed comparable language in the Act of June 21, 1906, 34 Stat. 325 (1906),² adopted six weeks after the 1906 proviso, as representing "the consent of the United States to state taxation" of lands patented in fee pursuant to

² This act read in relevant part:

That all restrictions as to the sale, encumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments[.]

34 Stat. 353.

such statute. *County of Mahnomon v. United States*, 319 U.S. 474, 477 (1943).³ State taxing authority over fee-patented lands was also consistent with the policy underlying the 1906 amendment to section 6; i.e., issuance of a fee title carried with it a Secretarial determination that the allottee was "competent and capable of managing his or her own affairs" and would therefore assume not only citizenship but also the ordinary responsibilities attendant to such status – including the obligation to pay taxes with respect to allotted land. S. Rep. No. 1998, 59th Cong., 1st Sess. 2 (1906) ("[t]he bill [eventually enacted as the 1906 amendment] also provides and authorizes that the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said lands shall be removed, and if that shall be done it would follow as a matter of course, under the provisions

³ The issue in *Mahnomon* was whether the affected allottee had voluntarily paid taxes between issuance of the fee patent and expiration of the 25-year trust period applicable to the allotment when initially made. See *Choate v. Trapp*, 224 U.S. 665 (1912) (Choctaw and Chickasaw allottees were entitled to the benefit of the entire period of exemption from state taxation provided for when they accepted fee patents even though Congress passed a later general statute authorizing taxation of lands held by Indians of the class to which the allottees belonged). The Court concluded that the allottee had paid the challenged taxes voluntarily during such period. No claim was made for taxes assessed for years after expiration of the original trust period, since the validity of that assessment was assumed.

of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States"); cf. *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980) (trust period restriction on alienation and taxation established "for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property"); *Goudy v. Meath*, 203 U.S. 146, 149 (1906) ("the purpose of the restriction upon voluntary alienation [under the General Allotment Act] is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation").

The amici curiae states generally treat fee-patented allotment lands owned by a tribe or tribal member no differently for property taxation purposes from lands owned in fee by nonmembers. Although the precise amount of lands so held has not been determined, the spate of recent litigation over this issue⁴ indicates that

⁴ Aside from the within matter, there are at least four other suits challenging application of state property taxes to fee-patented Section 6 land. *Cross v. Washington*, No. 89-35224 (9th Cir.); *United States v. South Dakota*, No. 90-301 (D.S.D.); *Assiniboine and Sioux Tribes v. Montana*, No. CV-89-271-BLG (D. Mont.); *Blackfeet Tribe v. Adams*, No. CV-89-100-GF (D. Mont.).

substantial acreage is involved.⁵ The Court of Appeals' decision, insofar as it remanded the proceeding below to the District Court with instructions to determine whether "the checkerboard jurisdiction that would result from Yakima County's taxation would affect [the Yakima Nation] in a demonstrably serious way" (Pet. 27a-28a; 903 F.2d at 1218), invites factually complex and repetitive litigation in an area where state authority has been rightly assumed for at least 85 years.

SUMMARY OF ARGUMENT

The Court of Appeals correctly concluded that the first proviso in section 6 of the General Allotment Act authorizes application of Washington ad valorem taxes to real property allotted pursuant to the General Allotment Act and now held in fee by the Yakima Nation or its members. In reaching this conclusion, the lower court

⁵ The allotment process contained in the General Allotment Act was formally terminated under section 1 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461. During the allotment period, approximately 90 million acres passed from trust status to nonmember ownership under a combination of surplus and fee-patented land purchases. See H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934). At the time of the Indian Reorganization Act's passage, 17.6 million acres were held by original allottees or their heirs. II F. Prucha, *The Great Father* 869 (1984). How much of the latter lands was held in trust and the extent to which the fee-patented portion has been alienated to nonmembers is unknown, as is the extent to which fee-patented lands may have been returned to trust status or the amount of fee lands alienated to nonmembers prior to 1934 but later reacquired by a tribe or its members.

applied the settled principle that such lands could not be subjected to those taxes absent express congressional authorization. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). What the court affirmed in one respect, however, it effectively denied in another by remanding for further evidentiary hearings on whether application of the ad valorem taxes would "affect [the Yakima Nation] in a demonstrably serious way[.]" Pet. 28a; 903 F.2d at 1218. Remand for such hearings was clearly improper since the requisite taxation authority had already been found. The opinion below in that regard runs contrary to decisions by this Court and, in view of the substantial amount of allotment activity on western and midwestern Indian reservations, raises the specter of complex litigation concerning this issue on other reservations in the amici curiae states.

ARGUMENT

The Court of Appeals meticulously addressed each of the Yakima Nation's grounds for its challenge to the plain meaning of the language in section 6 removing "all restrictions as to . . . taxation of [fee-patented] land". It first examined, *inter alia*, *Squire v. Capoeman*, 351 U.S. 1 (1956), which was found to support "Congress's clear intent to permit the state to tax fee patented land owned by Indian tribes or their members." Pet. 14a; 903 F.2d at 1212. The court next distinguished the holding in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that the introductory language of section 6, which subjected fee-patent allottees "to the laws, both civil and criminal, of the State or Territory in which they may

reside[.]" was an insufficiently explicit authorization for the imposition of personal property and cigarette taxes on tribal members, reasoning that *Moe* was not concerned with the effect of the first proviso. Pet. 15a-18a; 903 F.2d at 1213-14. It finally rejected any contention that the proviso had been impliedly repealed by later legislation, since "mere repudiation of [the allotment] policy is insufficient to render a statute legally void." Pet. 20a; 903 F.2d at 1215 (emphasis in original).

Having determined that the first proviso in section 6 provided the requisite consent to imposition of state and ad valorem taxes upon fee-patented lands, the Court of Appeals' analysis should have ended. The court nonetheless continued on to consider whether such taxation could be prohibited by "the checkerboard jurisdiction that would result from finding that Yakima County had power to tax." Pet. 23a; 903 F.2d at 1216. It then concluded, based upon *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 109 S. Ct. 2994 (1989), that application of the state law may be preempted if the tribe could establish its political integrity, economic security, health or welfare was imperiled by the taxation. The Court of Appeals' reasoning in this respect reflects misunderstanding of the plenary power doctrine and *Brendale*.

This Court recognized in *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985), that, "[i]n keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians." *Accord Cabazon*, 480 U.S. at 207 ("The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and

their territory,' . . . and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States[.]' . . . It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided") (citations omitted); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance"). When such plenary power is exercised, any common-law developed immunity against state taxation which tribes or their members possess is eliminated and the taxes may be applied without offending the Supremacy Clause.

Brendale does not teach the contrary. It arose from a claim to exclusive tribal zoning jurisdiction over nonmember-owned lands within the Yakima Reservation and was resolved by determining the scope of the tribe's retained, inherent regulatory authority. Four members of the Court, speaking through Justice White, stated that a tribe never has such regulatory power, at least absent consent, and must vindicate any "protectable interest" against state zoning regulation of nonmember lands through state or federal administrative or judicial proceedings. 109 S. Ct. at 3008.⁶ The Yakima Nation

⁶ Justice Stevens, writing for himself and Justice O'Connor, concluded that tribal zoning authority over nonmember lands could exist in limited circumstances - i.e., as to discrete areas within a reservation where nonmember ownership is *de minimis* and a tribe implicitly retains the right to maintain such areas' "unadulterated character." 109 S. Ct. at 3015. The

(Continued on following page)

possesses no such protectable interest here because, as the Court of Appeals found, Congress authorized states in section 6 to tax fee-patented lands. That such authorization may result in some, but not all, lands within a reservation being taxed is thus irrelevant for preemption purposes. Cf. *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 505 (1979) ("checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution").⁷ Equally irrelevant is

(Continued from previous page)

remaining three justices would have found exclusive tribal zoning jurisdiction over the nonmember lands, reasoning that tribes should be deemed to retain inherent regulatory authority over all nonmember activity within the reservation unless limited by statute or treaty and that concurrent application of tribal and state zoning jurisdiction was "by its very nature . . . unworkable." *Id.* at 3020, 3026 (Blackmun, J., concurring and dissenting). Tribal regulatory authority, of course, is not at issue here, and the only significance of *Brendale* is whether it somehow established a free-standing "protectable interest", defined in terms of a tribe's political integrity, economic security, health or welfare, which may serve to negative an otherwise explicit congressional grant of authority to states. As developed in the text below, *Brendale* neither could nor did authorize creation of such an interest in derogation of section 6's taxation proviso.

⁷ *Moe* is compatible with this conclusion. There the Court rejected an argument that allottees, to the extent they became subject "to the laws, both civil and criminal, of the State or Territory in which they may reside[.]" enjoyed no immunity against state personal property and cigarette taxes. The Court observed that a contrary conclusion would mean "for all jurisdictional purposes - civil and criminal - the Flathead Reservation has been substantially diminished in size." 425 U.S. at 478 (emphasis in original). It later stated that "Congress by its

(Continued on following page)

whether the state taxation may have a demonstrably negative effect on the tribe, since the existence of such an impact cannot serve to obviate the congressional consent in the first proviso. Indeed, if credited, the Court of Appeals' analysis would permit courts, through application of common-law principles, to repeal on a selective basis admittedly valid statutory provisions and would mean states could never rely conclusively on express congressional consent to tax tribes or their members. Neither *Brendale* nor any other decision sanctions that result.

The Court of Appeals' improper application of *Brendale* implicates more than academic concerns. Allowing state property taxes to be challenged on the ground that they imperil a tribe's political integrity, economic stability, health or welfare will expose many state and local governments to expensive and likely drawn-out challenges to important sources of revenue. Not only is there risk that this revenue may be interrupted during the litigation's course, but there is also no assurance that multiple litigation as to a particular reservation will not occur because the effect of the taxation on tribal interests

(Continued from previous page)

more modern legislation has evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *Id.* at 479. *Moe* accordingly does not stand for the proposition that the existence of a checkerboard jurisdictional pattern is itself a basis for preemption; rather, it found the possibility of such jurisdiction a basis upon which to construe a generally worded statutory provision as not containing the requisite express authorization to tax.

can vary significantly over time. The lower court's decision thus invites recurrent, complex litigation as to particular parcels within a single reservation.⁸ The practical ramifications of the opinion below are significant and, when combined with the manifest error in its *Brendale* analysis, warrant review.

⁸ As the petitioners observe (Pet. 10-11), application of the *Brendale* demonstrable harm test in a taxing situation presents numerous factual considerations. Those and other considerations will form the basis of a detailed inquiry into the effect of state taxation on *individual* pieces of property within a reservation, since it is entirely possible that, while a tax will have no impact on a tribe's economic security, political integrity, health or welfare when applied to some landowners, a stronger showing of tribal prejudice may be present as to other landowners. The effect of state taxation on particular landowners also may vary from year to year, thereby limiting any affirmative relief against a state to discrete tax years and raising the possibility of annual challenges and attendant litigation.

CONCLUSION

The amici curiae states respectfully request that the petition be granted and this matter be scheduled for plenary briefing and oral argument on the merits. Alternatively, the Court of Appeals' judgment should be summarily reversed to the extent it remanded for further evidentiary hearings the question of whether application of the Washington ad valorem tax imperils the Yakima Nation's political integrity, economic security, health or welfare.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

COUNTY OF YAKIMA, and DALE A. GRAY,
YAKIMA COUNTY TREASURER,
v. *Petitioners,*

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
WASHINGTON STATE ASSOCIATION OF COUNTIES
AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	3
I. THE TAX STATUS OF MILLIONS OF ACRES OF FEE LAND IS THROWN INTO DOUBT BY THE OPINION BELOW, UNSETTLING CONSISTENT PRACTICE AND EXPRESSED AUTHORITY OF CONGRESS SINCE 1906.....	3
II. AVOIDANCE OF "CHECKERBOARD JURIS- DICTION" IS NOT A RULE OF LAW AND SHOULD NOT BE APPLIED IN REAL PROPERTY TAXATION, WHERE IT WOULD CREATE, RATHER THAN REDUCE CON- FUSION	4
III. THE UNCERTAINTY OF REAL PROPERTY TAX STATUS WILL RENDER THE BUDGET PROCESS OF STATES AND POLITICAL SUBDIVISIONS UNMANAGEABLE	6
IV. INACTION WOULD UNFAIRLY DEPRIVE STATE AND LOCAL GOVERNMENTS OF A PRIMARY SOURCE OF REVENUE AVAIL- ABLE FOR PROVISION OF GOVERNMENT SERVICES TO FEE OWNED LAND	8
CONCLUSION	9
APPENDIX.....	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Brendale v. Confederated Tribes</i> , 109 S.Ct. 2994 (1989)	3, 4, 6, 7
<i>Confederated Tribes v. County of Yakima</i> , 903 F.2d 1207 (1990)	3
<i>Seymour v. Superintendent of Washington State Penitentiary</i> , 368 U.S. 351 (1961)	5, 6
CONSTITUTIONAL PROVISIONS	
WASH. CONST. art. VII, § 2	8
STATUTES	
18 U.S.C. § 1151	5
25 U.S.C. § 349	3, 4
Wash. Rev. Code § 84.52.040	6
Wash. Rev. Code § 84.52.070	7
OTHER AUTHORITIES	
<i>Lands Under Jurisdiction of Bureau of Indian Affairs as of September 30, 1985</i> , pp. 2-3, Annual Report of the U.S. Department of Interior (1986)	2
<i>General Population Characteristics, United States Summary, 1980 Census of Population, Table 71, General Characteristics for American Indian Persons on Reservations and Alaska Native Villages</i> , pp. 1-301 - 1-303	2

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INTEREST OF THE *AMICUS CURIAE*

The Washington State Association of Counties (WSAC) is the organization representing county governments in the State of Washington. Through its membership, urban, suburban and rural counties join together for effective and responsible county government. The organization has the following goals: to improve county government, to serve as spokesman throughout

the state for county governments; and to achieve public understanding of the role of counties in the state and federal systems of government.¹

In twenty-six states the Bureau of Indian Affairs has jurisdiction over more than 1000 acres of reservation or trust lands. In these states alone, the total acreage of such land exceeded 53 million acres in 1985, an area larger than all New England and the eastern third of New York State. No known figures exist on the portion consisting of Indian-owned fee lands. Data does, however, exist upon the number of Indian and non-Indian residents of these lands.² Approximately 930,000 persons, including some 380,000 non-Indians lived on these lands in 1980. County members of WSAC are the instruments of state government responsible for continued taxation of these lands in the state of Washington for the benefit of all taxing districts, and are in turn primarily dependent upon such taxes upon real property for the revenue with which to perform these and all other governmental functions. WSAC submits this brief to give the Court a broader presentation of the widespread impact of the Court of Appeals' decision than raised by the litigants themselves.

¹ Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The Consent to the filing of this brief has been filed with this Court.

² Appendix A contains information on the Reservation and Trust Lands in the States where lands subject to Bureau of Indian Affairs jurisdiction exceeds 1000 acres. Land data are extracted from *Lands Under Jurisdiction of Bureau of Indian Affairs as of September 30, 1985*, pp. 2-3, Annual Report of the U.S. Department of Interior (1986); population data are extracted from General Population Characteristics. United States Summary, 1980 Census of Population, Table 71, *General Characteristics for American Indian Persons on Reservations and Alaska Native Villages*, pp. 1-301 through 1-303.

STATEMENT

Amicus Curiae, Washington State Association of Counties, adopts the statement of the case filed by Yakima County, et al., in the Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Washington State Association of Counties believes the Writ of Certiorari filed by Yakima County should be granted for the following reasons:

I. THE TAX STATUS OF MILLIONS OF ACRES OF FEE LAND IS THROWN INTO DOUBT BY THE OPINION BELOW, UNSETTLING CONSISTENT PRACTICE AND EXPRESSED AUTHORITY OF CONGRESS SINCE 1906.

The Circuit Court opinion would require that even state taxation of fee allotments expressly authorized under 25 U.S.C. § 349 by Congress suffer the case-by-case analysis extracted from one of the opinions in *Brendale v. Confederated Tribes*, 492 U.S. —, 109 S.Ct. 2994 (1989) (involving zoning issues about which this Court determined Congress had not spoken,) to decide whether taxation would "... imperil the political integrity, economic security or the health and welfare of the tribe." *Confederated Tribes v. County of Yakima*, 903 F.2d 1207 (1990) at 1218. It is unclear whether that analysis would turn in part on the extent to which the Tribe had excluded non-Indians from its reservation, as it did in *Brendale*, 109 S.Ct. at 3014-3015. The use of *Brendale* adopted by the Court of Appeals was not suggested by either of the parties. Neither party relied upon *Brendale* in oral argument, and the United States did not mention *Brendale* in its *Amicus Curiae* Rehearing Brief.

Though the Ninth Circuit's opinion applied only to specific parcels of real property in one county, it will, if certiorari is denied, render uncertain the continued tax-

ability of virtually all formerly allotted fee lands throughout the United States, upon which state and county governments have depended since taxation and state law were expressly made applicable to those lands by 25 U.S.C. § 349.

Also, if courts must, as the Ninth Circuit required here in the field of taxation of real property, balance impacts upon tribes of state action expressly authorized by Congress, every other form of expressly authorized state action, and every other form of expressly authorized federal action will be imperiled.

If the opinion of the Ninth Circuit stands, the continued taxability of the fee-owned lands of the approximately 550,000 Indian residents of reservations in state having significant Indian reservations would be rendered uncertain until completion of litigation to decide the effect of the "*Brendale* test." Litigation could be repeated as circumstances change leaving the tax base always uncertain.

By granting certiorari here, this Court has the opportunity to confirm both the explicit direction of Congress and over eighty years of settled practice in Indian taxation. To deny certiorari in this case will introduce uncertainty into one of the few areas where there has been clarity, and will promote endless litigation where there has been the order of law.

II. AVOIDANCE OF "CHECKERBOARD JURISDICTION" IS NOT A RULE OF LAW AND SHOULD NOT BE APPLIED IN REAL PROPERTY TAXATION, WHERE IT WOULD CREATE, RATHER THAN REDUCE CONFUSION.

The Ninth Circuit's application of the "*Brendale* test" to taxation of real property to avoid effects of "checkerboard jurisdiction," would instead create a horrendous cloud of uncertainty; the antithesis of previous opinions of this Court that sought to minimize the effects of

"checkerboard jurisdiction" to avoid just such uncertainty. This Court's doubt about the desirability of "checkerboard jurisdiction" promotes sensible government; but that doubt is not a rule of law to be invoked when it will result in chaos.

This Court first expressed concern about the effect of "checkerboard jurisdiction" some thirty years ago in another case arising in the state of Washington. Paul Seymour, a young Indian, was tried and convicted of burglary in the Superior Court of Washington for Okanogan County for entry into a house in the portion of the City of Omak that lies within the external boundaries of the Reservation of the Colville Confederated Tribes. Mr. Seymour was released upon a Writ of Habeas Corpus when this Court decided that Okanogan County Superior Court did not have jurisdiction over the offense, because it took place in Indian country.

The nub of this Court's reasoning was as follows:

[When] the existence or nonexistence of Federal jurisdiction depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to *search tract books* in order to determine whether criminal jurisdiction over each particular offense, though committed within the reservation, is in the State or Federal government. [Footnote omitted]

Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] Section 1151 and we see no justification for adopting an unwarranted construction of that language where the result would merely be to recreate confusion Congress specifically sought to avoid. [Emphasis supplied.]

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 at 358 (1961). The Court of Appeals' attempt here to apply that rule, not only fails to

avoid the confusion that the rule was designed to avoid, it compounds confusion.

Whether on or off an Indian reservation, it is the *duty* of taxing officials to "search tract books." Determination of taxability and of taxable value requires that each tax parcel be evaluated separately and deliberately. Separate analysis of each parcel of property for each type of tax, such as ad valorem and real estate excise tax, is the norm.

If the Ninth Circuit decision, applying *Brendale* in tax cases involving real property is not corrected, the confusion, eschewed by the Court in the context of on-site arrest and prosecution of felonies in *Seymour*, will be increased many times for state and local jurisdictions. Besides carrying out the normal duties of a tax assessor or treasurer, such as visiting and evaluating the property and examining the nature of its title, local authorities will now have to decide the tribal enrollment status of the owner of every piece of fee land in every reservation. They will then have to litigate or make a very subjective judgment whether continued taxation of the particular tract will imperil the political, economic or social welfare of the local Indian tribe, considering the extent to which tribal rights to exclude non-members continue to exist.

In short, the Ninth Circuit's application of *Brendale*, in an attempt to minimize confusion caused by checkerboard jurisdiction, would instead exacerbate uncertainty.

III. THE UNCERTAINTY OF REAL PROPERTY TAX STATUS WILL RENDER THE BUDGET PROCESS OF STATES AND POLITICAL SUBDIVISIONS UNMANAGEABLE.

The levies of tax by each political subdivision of the state must be spread equally over all taxable property within each taxing district. Wash. Rev. Code § 84.52.040. On or before the 30th of November of each year, the

budgets and amounts and rates of tax to be levied for the next year for all political subdivisions of the state must be certified to the county assessor. Wash. Rev. Code § 84.52.070. Similar procedures for determination and application of real property tax levies apply in almost every state.

If the decision of the Court of Appeals is allowed to stand, there exists a large potential for case-by-case litigation declaring some fee lands free of formerly authorized taxation. Thus, municipalities or states that contain Indian reservations will not know, at the time of certifying budgets and setting levy rates, whether the budgets should be spread over formerly allotted fee lands owned by Indians within their borders.

In addition states, and municipalities will not be able to anticipate the level of revenue upon which they can plan, because taxability will depend on the whimsical nature of private real estate transactions from year to year. There is no way to predict who will convey to whom; Indians to non-Indians or vice versa. Since tribal membership of owners could not be known until the owner comes forward to provide evidence, it is almost certain that it will be several years after taxes are levied, and after funds are obligated, in reliance upon the security of the land, that counties will learn many of the claimed exemption. Any real property later determined to be free of state and local taxation will be identified only long after all services for which it was levied have been provided, and long after the opportunity to spread the loss over the rest of the taxable property.

In most state and local jurisdictions the effects of litigation attempting to apply a *Brendable* standard to real property taxation would be immediate, continuing and serious to their ability to serve critical needs both on and off reservations. In political subdivisions of the State of Washington consisting largely of Indian reservations

and Indian populations, most of the tax base upon which service by political subdivisions to the population has been dependent would be eliminated, placing those services to both Indian and non-Indian citizens in jeopardy.

IV. INACTION WOULD UNFAIRLY DEPRIVE STATE AND LOCAL GOVERNMENTS OF A PRIMARY SOURCE OF REVENUE AVAILABLE FOR PROVISION OF GOVERNMENT SERVICES TO FEE OWNED LAND.

State and local government are required by law to perform government services on reservations and must be assured of a predictable source of revenue to carry out these functions. They provide a variety of services to both Indians and non-Indians within the external boundaries of reservations. These services include education, criminal justice, public works (roads, bridges, facilities) and social welfare.

Real estate taxes constitute a major source of revenue for these services. In the state of Washington, these taxes are the primary source of revenue for political subdivisions. The total amount of property tax that can be collected by any political subdivision without a supermajority vote is constitutionally limited to 1% of the property value, to prevent collection of an unfair amount from parcels taxed. WASH. CONST. art. VII, § 2. Because the need for governmental services is rapidly rising, the effect of constitutional and statutory limitations is that most jurisdictions in Washington are already taxing at the maximum rate allowed by law. They cannot assign more tax to remaining property, if the property tax base is decreased, even if their duties remain constant or grow.

The Ninth Circuit opinion will deprive many state and local governments of significant portions of the revenue derived from real estate taxation of allotted land on Indian reservations. Aside from the fact that Congress has

clearly stated that this land is taxable, the withdrawal of these revenues from local coffers would be fundamentally unfair because local government must still provide services. If Tribal or Federal governments were able and willing to take over all these services, the situation might be different, but they are not.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Yakima County should be granted.

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APPENDIX

APPENDIX

States Where Bureau of Indian Affairs Jurisdiction
Exceeds 1000 Acres (as of September 30, 1985)

State	BIA Jurisdiction Acreage	Total Persons Residing	Total Indians Residing	% Indians
Alaska	970,872	1,195	952	80%
Arizona	20,110,294	167,875	148,996	89%
California	569,152	39,684	11,305	29%
Colorado	788,407	6,877	1,966	29%
Connecticut	1,201	62	27	44%
Florida	154,173	3,593	1,091	30%
Idaho	824,009	28,541	5,475	19%
Iowa	4,169	5,968	1,767	20%
Kansas	29,998	1,672	716	43%
Maine	212,699	1,430	1,235	86%
Michigan	21,656	26,842	1,587	6%
Minnesota	765,370	25,166	9,648	33%
Mississippi	17,926	2,866	2,766	96%
Montana	4,210,947	49,564	23,598	48%
N. Carolina	56,573	5,717	4,844	85%
N. Dakota	852,366	35,603	16,422	46%
Nebraska	64,858	9,153	2,864	31%
New Mexico	8,018,615	158,510	136,463	86%
Nevada	1,228,726	5,682	4,780	84%
Oklahoma	1,112,805	39,327	4,749	12%
Oregon	769,044	5,602	3,536	64%
S. Dakota	5,082,737	54,219	30,769	57%
Utah	2,320,044	128,077	107,332	83%
Washington	2,556,886	79,046	10,440	21%
Wisconsin	417,912	24,259	9,591	40%
Wyoming	1,888,558	23,157	4,150	18%
TOTAL	53,049,997	930,187	553,058	59%

STATUTORY PROVISIONS

25 USC § 349. Patents in fee to allottees

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act [25 USC § 348], then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And pro-

vided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

(Feb. 8, 1887, ch 119, § 6, 24 Stat. 390; May 8, 1906, ch 2348, 34 Stat. 182.)

18 USC § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(June 25, 1948, ch 645, § 1, 62 Stat. 757; May 24, 1949, ch 139, § 25, 63 Stat. 94.)

Wash. Const. art. VII § 2 Limitation on Levies. Except as hereinafter provided and notwithstanding any other provision of this Constitution, the aggregate of all tax levies upon real and personal property by the state and all taxing districts now existing or hereafter created, shall not in any year exceed one per centum of the true and fair value of such property in money: *Provided, however,* That nothing herein shall prevent levies at the rates now provided by law by or for any port or public utility district. The term "taxing district" for the purposes of this section shall mean any political subdivision, municipal corporation, district, or other governmental agency authorized by law to levy, or have levied for it, ad valorem taxes on property, other than a port or public utility district. Such aggregate limitation or any specific limitation imposed by law in conformity therewith may be exceeded only

(a) By any taxing district when specifically authorized so to do by a majority of at least three-fifths of the electors thereof voting on the proposition to levy such additional tax submitted not more than twelve months prior to the date on which the proposed levy is to be made and not oftener than twice in such twelve month period, either at a special election or at the regular election of such taxing district, at which election the number of persons voting "yes" on the proposition shall constitute three-fifths of a number equal to forty per centum of the total votes cast in such taxing district at the last preceding general election when the number of electors voting on the proposition does not exceed forty per centum of the total votes cast in such taxing district in the last preceding general election; or by a majority of at least three-fifths of the electors thereof voting on the proposition to levy when the number of electors voting on the proposition exceeds forty per centum of the total votes cast in such taxing district in the last preceding general election: *Provided,* That notwithstanding any other provision of this Constitution, any proposition pur-

suant to this subsection to levy additional tax for the support of the common schools may provide such support for a two year period and any proposition to levy an additional tax to support the construction, modernization, or remodelling of school facilities may provide such support for a period not exceeding six years;

(b) By any taxing district otherwise authorized by law to issue general obligation bonds for capital purposes, for the sole purpose of making the required payments of principal and interest on general obligation bonds issued solely for capital purposes, other than the replacement of equipment, when authorized so to do by majority of at least three-fifths of the electors thereof voting on the proposition to issue such bonds and to pay the principal and interest thereon by an annual tax levy in excess of the limitation herein provided during the term of such bonds, submitted not oftener than twice in any calendar year, at an election held in the manner provided by law for bond elections in such taxing district, at which election the total number of persons voting on the proposition shall constitute not less than forty per centum of the total number of votes cast in such taxing district at the last preceding general election: *Provided,* That any such taxing district shall have the right to vote of its governing body to refund any general obligation bonds of said district issued for capital purposes only, and to provide for the interest thereon and amortization thereof by annual levies in excess of the tax limitation provided for herein, *And provided further,* That the provisions of this section shall also be subject to the limitations contained in Article VIII, Section 6, of this Constitution;

(c) By the state or any taxing district for the purpose of paying the principal or interest on general obligation bonds outstanding on December 6, 1934; or for the purpose of preventing the impairment of the obligation of a contract when ordered so to do by a court of last resort.

Wash. Rev. Code (1989) § 84.52.040 Levies to be made on assessed valuation. Whenever any taxing district or the officers thereof shall, pursuant to any provision of law or of its charter or ordinances, levy any tax, the assessed value of the property of such taxing district shall be taken and considered as the taxable value upon which such levy shall be made. [1961 c 15 § 84.52.040. Prior: 1919 c 142 § 3; RRS § 11228.]

Wash. Rev. Code (1989) § 84.52.070 Certification of levies to assessor. It shall be the duty of the county legislative authority of each county, on or before the thirtieth day of November in each year, to certify to the county assessor of the county the amount of taxes levied upon the property in the county for county purposes, and the respective amounts of taxes levied by the board for each taxing district, within or coextensive with the county, for district purposes, and it shall be the duty of city councils of cities of the first class having a population of three hundred thousand or more, and of city councils of cities of the fourth class, or towns, and of all officials or boards of taxing districts within or coextensive with the county, authorized by law to levy taxes directly and not through the county legislative authority, on or before the thirtieth day of November in each year, to certify to the county assessor of the county the amount of taxes levied upon the property within the city or district for city or district purposes. If a levy amount is not certified to the county assessor by the thirtieth day of November, the county assessor shall use no more than the certified levy amount for the previous year for the taxing district: *Provided*, That this shall not apply to the state levy or when the assessor has not certified assessed values as required by RCW 84.48.130 at least twelve working days prior to November 30th. [1988 c 222 § 28; 1961 c 15 § 84.52.070. Prior: 1925 ex.s. c 130 § 78; RRS § 11239; prior: 1890 p 558 §§ 77, 78; Code 1881 § 2881.]

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for the Ninth Circuit

BRIEF FOR LA PLATA COUNTY, COLORADO;
BANNOCK COUNTY, LEWIS COUNTY AND POWER
COUNTY, IDAHO; MAHNOMEN COUNTY, MINNESOTA;
BLAINE COUNTY, FLATHEAD COUNTY, GLACIER
COUNTY, LAKE COUNTY AND ROOSEVELT COUNTY,
MONTANA; THURSTON COUNTY, NEBRASKA; SIOUX
COUNTY, NORTH DAKOTA; CHARLES MIX COUNTY,
CORSON COUNTY, DEWEY COUNTY AND TODD
COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY,
UTAH; AND FREMONT COUNTY, WYOMING,
AS AMICI CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. CONGRESSIONAL DOCUMENTATION	5
II. ADMINISTRATIVE INTERPRETATION.....	7
III. THE UNITED STATES AND THIS COURT....	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:

	Page
<i>Brendale v. Confederated Tribes & Bands of Yakima Indian Nation</i> , 109 U.S. 2994 (1989) ..2, 4, 5, 13	
<i>Choteau v. Burnet</i> , 283 U.S. 691 (1930)	9
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979)	10
<i>Duro v. Reina</i> , 110 S. Ct. 2053 (1990)	8
<i>Draper v. United States</i> , 140 U.S. 240 (1896)	9
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	9
<i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	10
<i>Nichols v. Rysavy</i> , 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987)	10
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	10
<i>United States v. Mason</i> , 412 U.S. 391 (1973)	11
<i>United States v. Mitchell</i> , 445 U.S. 536 (1980)	5, 12, 13
<i>United States v. Rickert</i> , 403 U.S. 432 (1903)	9

CONGRESSIONAL MATERIALS:

11 Cong. Rec. (Excerpts) (1881)	6
13 Cong. Rec. 3211 (1882)	6
15 Cong. Rec. 2242 (1884)	6
General Allotment Act of 1887 (24 Stat. 388)	passim
Burke Act of 1906 (34 Stat. 182)	6, 8, 10

MISCELLANEOUS:

19 Op. Atty. Gen. 161 (1888)	7
30 L.D. 258 (1900)	7
50 L.D. 591 (1926)	7
53 L.D. 107 (1930)	7
53 L.D. 133 (1930)	7
Brief for Petitioner, <i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	10
Brief for the United States, <i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	10
Brief for the United States, <i>United States v. Mason</i> , 412 U.S. 391 (1973)	10
Brief for the United States, <i>United States v. Mitchell</i> , 445 U.S. 536 (1980)	12

TABLE OF AUTHORITIES—Continued

	Page
Brief for the United States, <i>United States v. Rickert</i> , 403 U.S. 432 (1903)	9
Leupp, <i>The Indian and His Problem</i> (1910)	8
McLaughlin, <i>My Friend the Indian</i> (1910)	8-9
Memorandum of Associate Solicitor (1989)	8
Memorandum for the United States, <i>Yakima Nation v. Yakima County</i> , 903 F.2d 1207 (9th Cir. 1990)	4
Pfaller, James McLaughlin, <i>The Man With the Indian Heart</i> (1978)	9
Transcript of Oral Argument, <i>United States v. Mason</i> , 412 U.S. 391 (1973)	11
Transcript of Oral Argument, <i>United States v. Mitchell</i> , 445 U.S. 536 (1980)	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-408

COUNTY OF YAKIMA and DALE A. GRAY,
YAKIMA COUNTY TREASURER,
Petitioners,

v.

CONFEDERATED TRIBES and
BANDS OF THE YAKIMA NATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR LA PLATA COUNTY, COLORADO;
BANNOCK COUNTY, LEWIS COUNTY AND POWER
COUNTY, IDAHO; MAHNOMEN COUNTY, MINNESOTA;
BLAINE COUNTY, FLATHEAD COUNTY, GLACIER
COUNTY, LAKE COUNTY AND ROOSEVELT COUNTY,
MONTANA; THURSTON COUNTY, NEBRASKA; SIOUX
COUNTY, NORTH DAKOTA; CHARLES MIX COUNTY,
CORSON COUNTY, DEWEY COUNTY AND TODD
COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY,
UTAH; AND FREMONT COUNTY, WYOMING,
AS AMICI CURIAE IN SUPPORT OF THE PETITION
FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

This Brief is filed in support of the petition for a writ of certiorari, with the expectation that respondent will challenge the validity of the taxes in question in a cross-petition. We disagree with respondent on the merits, but agree that the cross-petition should also be granted.

The concern that prompts the filing of this Brief can be simply stated. Since 1987 tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands. Almost without exception, the tribal arguments are loosely premised on bits and scraps of language from several unrelated opinions of this Court in the 1970's. The court of appeals correctly rejected the tribal arguments, but erroneously construed *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989), to require a case by case analysis of tribal interests. As a result, this *Brendale* remand promises, in the interim, that more members of other tribes will refuse to pay their taxes (everywhere), that more tax abatement petitions will be filed (La Plata County, Colorado), that more lawsuits will be filed against counties in State courts (Corson County, South Dakota), that more tribal lawsuits will be filed against counties in federal court (two in Montana), and even worse, that the United States will, as it did just four months ago, *after* the decision below, designate other *Amici* or other counties similarly situated (and there are many), and sue those counties and their States in federal court in the name of the United States (Todd County, South Dakota). (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

The Counties joining in this Brief all contain areas that at one time were established as Indian Reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered throughout the counties, some of which are owned by Indians and Indian Tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. As *Amici* States note, the precise amount of lands nationally has not been determined. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in Todd County, South Dakota, approximately 60 percent of the entire county is held in trust by the United States for the Rosebud Sioux Tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 10 percent of the seven hundred and fifty thousand (\$750,000) to eight hundred and fifty thousand (\$850,000) dollars of total taxes collected by the county per year in recent years. In Dewey County, South Dakota, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But this is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional

Policy. That Congressional Policy has authorized the taxes here—and not on a case by case basis as the court of appeals has indicated.

Importantly, county government simply cannot afford to litigate for years to find out whether other courts will agree or disagree with the court of appeals on the merits, even if this Court summarily rejects the *Brendale* remand. The issue in this case represents a fundamental and most basic concept in Federal Indian Law that has been resolved and relied on for decades. For this reason, *Amici* respectfully submit that this Court grant the petitions and authoritatively document and set forth that concept in this case.

In the process, perhaps the Solicitor General should be invited to express the views of the United States. Although the United States did not participate below except as *Amicus* in support of the tribal petition for rehearing and suggestion for rehearing *en banc*, at that time the United States told the court of appeals “The issue is of great importance to Indians on reservations throughout the United States. . . . The broad importance of the decision to reservation Indians makes this case an appropriate candidate for a rehearing, including reconsideration *en banc*. . . .” Memorandum for the United States at 1-2. And the Secretary of the Interior has publicly stated that this issue “cries out for clarification” and the sooner it ends up in the Supreme Court, the better. *Amici* App. 52a-53a. *Amici* agree.

On the merits, the United States also told the court of appeals that to tax Indian fee lands would “create an exception, without any policy basis, from the general rule that the state may not tax Indians or their property on reservations.” Memorandum for the United States at 2. What the United States did not tell the court of appeals, *Amici* would submit, is even more significant. Time and time again, for almost a century the United States has told everyone else, including this Court, a different story.

SUMMARY OF ARGUMENT

Petitioner and *Amici Curiae* States have set forth in detail the reasons the court of appeals misconstrued *Brendale*, and while we agree with those important points, they are not repeated here.

The argument of *Amici Curiae* Counties centers around the fundamental validity of the taxes in question and the support for that position in the legislative history of the General Allotment Act and in the manner in which the United States and this Court have consistently construed this most important legislation.

ARGUMENT

I. CONGRESSIONAL DOCUMENTATION.

Perhaps no other area of Federal Indian Law has been better understood than the taxing of Indian fee lands authorized by Congress in the General Allotment Act of 1887 (24 Stat. 388). In the beginning, even the general public was involved in the debate on the fundamental aspects of the question presented. Meetings were held, memorials passed, and Congress was inundated with the pros and cons of the allotment policy. When first introduced in 1881, the Senate debated the overall issue day after day. In subsequent years, the debate continued, bills passed the Senate, were stalled in the House, and in 1887 the measure finally passed. Some of this legislative history was recently submitted to this Court by the United States in *United States v. Mitchell*, 445 U.S. 536 (1980). A more complete index is set forth in *Amici* App. 1a-2a. The General Allotment Act documents cited there are replete with evidence that Congress clearly intended, after the expiration of twenty-five year trust, that Indian fee lands would be taxed as all other fee lands. For example, in 1881, the first provision that incorporated this concept stated:

That the lands acquired by any Indian under and by virtue of this act shall not be subject to alienation,

lease, or incumbrance, either by voluntary conveyance or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable, and not subject to taxation, lien, or incumbrance, for the period of twenty-five years from the date of the patent, which said restrictions shall be incorporated in the patents when issued. 11 Cong. Rec. 875 (1881). *Amici App.* 3a.

When Senator Dawes introduced the language of the present section in related legislation, he stated "The Indian, therefore, under the law will be to all intents and purposes the occupant of the land and enjoy all its uses and at the end of the twenty-five years the United States will be obliged by the force of this provision to give him or his heirs a patent discharged of the trust and free of incumbrance. It will be impossible to raise the question of taxation under that provision . . . 13 Cong. Rec. 3211 (1882).

It was clear, as Senator Coke stated in the same debate, that "Section 5 prohibits the alienation of land by the Indians; it exempts the land from taxation, from lien or incumbrance *for twenty-five years.*" 11 Cong. Rec. 876-877 (1881) (emphasis added). And thereafter, the record is replete with similar statements. "Mr. Dawes. . . . The bill protects the property of the Indians for twenty-five years. *That is the limit.* That is the intent of the bill." 15 Cong. Rec. 2242 (1884) (emphasis added). Other representative statements to this same effect are set forth in *Amici App.* 3a-10a.

When Congress amended this provision for unrelated reasons in the Burke Act in 1906 (34 Stat. 182), this understanding was reflected in the text of the Act, as Petitioner and *Amici* States have discussed at length. It is also reflected in the legislative history set forth verbatim in *Amici App.* 11a-51a.

II. ADMINISTRATIVE INTERPRETATION.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

I am also of opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior re-enforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the Yakima Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

The United States thus retained its hold on the lands allotted for a period of 25 years after the allotment and as much longer as the President in his discretion might determine, and the *clearly expressed* intent of Congress is that *so long as* the land remains in *that* status it is beyond the power of the State to tax the same for any purpose.

53 L.D. 107 (1930) (emphasis added).

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970's, an Associate Solicitor of the Department of the Interior reasoned that:

[L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. (This Court briefly reviewed some of these same decisions in *Duro v. Reina*, 110 S.Ct. 2053 (1990). In contrast to the broad characterization of the Associate Solicitor, *Duro* particularly described the exemption noted there as extending to only "certain taxes on transactions of tribal members. . ." *Duro*, 110 S.Ct. at 2060.) On balance, the prior Interior opinions are entitled to more weight than the 1989 Memorandum. See, e.g., *Duro*, 110 S.Ct. at 2063. Other historical sources confirm this position.

For example, F.E. Leupp, the Commissioner of Indian Affairs at the time of the 1906 Burke Act also viewed the restrictions on taxation as tied to the trust status of the land. In his 1910 text, Commissioner Luepp summarized the administration of the General Allotment Act from his perspective and discussed the taxation issue in the context of fee lands. Leupp, *The Indian And His Problem*, 34, 47, 64, 75 (1910). (Also, see *Amici App.* 41a, 45a, where the recommendations of Commissioner Luepp are contained in the House and Senate Reports on the Burke Act.)

James McLaughlin worked for fifty-two years, 1871-1923, in the Indian service. As an inspector in the Department of the Interior, he had more experience in dealing with the General Allotment Act than any other individual of his time. In 1910, he summarized this experience in the following words:

In the process of civilization, they had arrived at a stage of their progress when, as part of the usual policy, they were given their lands in severalty. To each individual was allotted one hundred and sixty acres of land, the title to which was to be held in trust by the government for twenty-five years and

then patented in fee to the allottee. The allotted lands were to be free of taxes *during* the trust period.

McLaughlin, *My Friend the Indian*, 106 (1910) (emphasis added). See Pfaller, *James McLaughlin, The Man With the Indian Heart*, xi, 331-332 (1978).

III. THE UNITED STATES AND THIS COURT.

Although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1896), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 403 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land". Brief for the United States at 15, 42, *Rickert*, *supra* (emphasis added). The *Rickert* opinion reflects this representation:

no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . While the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 403 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath*, 203 U.S. 146, (1906), a related issue was generally discussed and decisively resolved. The *Goudy* argument, addressed in detail by others, need not be repeated here.¹

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limita-

¹ See, e.g., *Choteau v. Burnet*, 283 U.S. 691 (1930).

tion of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United States conceded that subsequent to that period, the land was legally taxable. Brief for the United States, at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).²

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, *supra*, the United States succinctly stated that:

this provision was undoubtedly intended to make it clear that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation. . . .

Brief for the Petitioner, note 4 at 13, *Squire v. Capoeman*, 351 U.S. 1, 13, n.4 (1956) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee*, but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

² Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen*, *supra*. Also, see *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987), and *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

In 1973, in *United States v. Mason*, 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

relied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . and provided for taxation after the termination of the trust.

Brief for the United States, at 9-10, 17, *Mason*, *supra* (emphasis added). The Court in *Mason* agreed:

Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' *when Indian property is granted in fee*. . . .

Mason, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted*. This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument, at 38, *United States v. Mason*, 412 U.S. 391 (1978) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 536 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

The General Allotment Act . . . for the limited purposes of (a) restraining improvident alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell*, *supra* (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the *meantime*, the United States was simply to hold title in trust solely for the purpose of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument, at 14, *United States v. Mitchell*, 445 U.S. 536 (1980). (emphasis added). This Court agreed:

[W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land is made inalienable and non-taxable for a sufficient length of times.' . . ."
Mitchell, 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly under-

stood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

CONCLUSION

For the foregoing reasons, the petition and the cross-petition should be granted and a writ of certiorari issued to the United States Court of Appeals for the Ninth Circuit. Summary disposition is not appropriate under the circumstances, unless that disposition specifically confirms that the Court of Appeals was generally correct in its views, except as to *Brendale*. Apart from *Brendale*, the subsidiary question of the validity of the taxes is an important question of federal law which should be settled by this Court at this time.

Respectfully submitted,

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October 9, 1990

APPENDIX

APPENDIX

INDEX TO LEGISLATIVE HISTORY OF THE
GENERAL ALLOTMENT ACT

The General Allotment Act or Dawes Act can be traced back to 1880 when similar bills were debated in the Senate, beginning with S. 1773, 48th Cong., 2nd Sess. (1880). That bill was reported in the Senate at 10 Cong. Rec. 3507. Then in the 48th Cong., 3d Sess. (1881), S. 1773 was considered and amended. See 11 Cong. Rec. 761, 778-788, 873-882, 904-913, 933-943, 994-1003, 1026-1038, 1060-1070, 1211, 1096, and 1253.

In 1882, a similar bill, S. 1445, 47th Cong., 1st Sess. (1882), was introduced in the Senate as a replacement for Senate bills 19 and 931. See 13 Cong. Rec. 1824. That bill was amended and passed the Senate. See 13 Cong. Rec. 3212.

S. 48, 48th Cong., 1st Sess. (1883) was introduced next and referred to the Senate Committee on Indian Affairs. See 15 Cong. Rec. 13. It was reported back with amendments in 1884. See 15 Cong. Rec. 877. It was then debated, amended, and passed. See 15 Cong. Rec. 2240-2242, 2277-2280. In the 48th Cong. 2nd Sess. (1884), S. 48 was referred to the House Committee on Indian Affairs. See 16 Cong. Rec. 218. It was then reported back with accompanying House Report 2247 (H.R. 2247, 48th Cong., 2nd Sess. (1884) Serial Set # 2328 Vol. 1). See 16 Cong. Rec. 580.

In 1885, S. 54, 48th Cong., 1st Sess. (1885) was introduced and referred to the Senate Committee on Indian Affairs. See 17 Cong. Rec. 123. It was reported back in 1886, see 17 Cong. Rec. 841, and was then debated, amended, and passed in the Senate. See 17 Cong. Rec. 1558, 1630-1635, 1674, 1719, 1762-1764. It was then referred to the House Committee on Indian Affairs, see 17 Cong. Rec. 1959, and reported back with House Report

1835. (H.R. 1835, 48th Cong., 1st Sess. Serial Set # 2440 Vol. 8). See 17 Cong. Rec. 3841.

S. 54 was then debated in the 49th Cong., 2nd Sess. as well. See 18 Cong. Rec. 189, 224-225. It was amended and passed the House, see 18 Cong. Rec. 226, and then referred to the Senate Committee on Indian Affairs. See 18 Cong. Rec. 247, 313. The bill was then returned to the House. See 18 Cong. Rec. 273, 285, 315. The Senate non-concurred in the House amendments, see 18 Cong. Rec. 476, and a conference was then appointed. See 18 Cong. Rec. 478, 534, 580. A conference report was made, debated, and agreed to. See 18 Cong. Rec. 772, 882, 972. The bill was then examined and signed, see 18 Cong. Rec. 1048, 1054, and approved by the President. See 18 Cong. Rec. 1577 (1887).

In 1906, the Burke Act was signed, amending section 6 of the Dawes Act of 1887. The Burke Act began as House Resolution 11946, 58th Cong., 1st Sess., and was first referred to the House Committee on Indian Affairs. See 40 Cong. Rec. 1110. It was reported back with amendments, accompanied by House Report 1556, (H.R. 1558, 59th Cong., 1st Sess. Serial Set # 4941 vol. 1). See 40 Cong. Rec. 2812. The bill was then debated, amended, and passed in the House. See 40 Cong. Rec. 3598, 3602. It was then referred to the Senate Committee on Indian Affairs, see 40 Cong. Rec. 3688, and was reported back with amendments and Senate Report 1998. (S.R. 1998, 59th Cong., 1st Sess. Serial Set # 4904 vol. 1). See 40 Cong. Rec. 4153. The bill was passed over, see 40 Cong. Rec. 5189, 5605, and was then debated, amended, and passed in the Senate. See 40 Cong. Rec. 5805. The House concurred in the Senate amendments. See 40 Cong. Rec. 5980. It was examined and signed, see 40 Cong. Rec. 6089, 6100, 6233, and was approved by the President. See 40 Cong. Rec. 7795.

EXCERPTS FROM THE LEGISLATIVE HISTORY OF THE GENERAL ALLOTMENT ACT OF 1887

Mr. COKE. In section 5 of this bill it is provided:

That the lands acquired by any Indian under and by virtue of this act shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable, and not subject to taxation, lien, or incumbrance, for the period of twenty-five years from the date of the patent, which said restrictions shall be incorporated in the patents when issued.

If the Senator's amendment prevails, will not that provision be rendered nugatory?

Mr. HOAR. I do not understand it so. . . .

11 Cong. Rec. 875 (1881).

Mr. COKE. . . . Section 5 prohibits the alienation of land by the Indians; it exempts the land from taxation, from lien or incumbrance for twenty-five years. . . .

11 Cong. Rec. 876-877 (1881).

Mr. COKE. . . . In the first place, his lands are exempt from judgment and from execution, are exempt from taxation, which those of no citizen are. . . .

11 Cong. Rec. 877 (1881)

Mr. COKE. . . . There is an exemption here from taxation. There is a prohibition against alienation. One is a privilege and the other a burden. They are put there for the benefit and protection of the Indian. . . .

11 Cong. Rec. 878 (1881)

Mr. BROWN. . . . It is true you exempt his land from taxes by this bill for a certain length of time. . . .

11 Cong. Rec. 880 (1881).

Mr. BROWN. . . . I trust, Mr. President, that we shall pass this bill in a shape that will give every Indian a home on his reservation, and guarantee it to him and his children for all time to come, and that the power of alienation will be restricted until he has learned the rights and the duties of an American citizen. After that let him and his posterity take care of it or alienate it as may any one else. Fix a reasonable time; exempt their homesteads from taxation. After that time there is no further exclusion in the fourteenth constitutional amendment in the way of counting them in the representative population of the States where they may reside, and no reason that I can see why they may not be full-fledged citizens and voters.

11 Cong. Rec. 882 (1881).

Mr. CALL. . . . But the bill cautiously and carefully proceeds with a preliminary period, a probationary period of twenty-five years, which shall be a period of preparation for them before their ownership of land shall be complete. . . .

11 Cong. Rec. 908 (1881).

Mr. PLUMB. . . . If that position of the bill which provides that these lands shall not be alienated and shall not be subject to taxation for a period of twenty-five years and shall not be leased until the same period shall pass, you will find about your doors here from year to year an increasingly tumult from the communities in which you have set these people, exempt from the burdens of the Government and occupying lands which they cannot cultivate—a tumult which you cannot prevent and the consequences of which you cannot avoid.

11 Cong. Rec. 942 (1881).

Mr. TELLER. . . . It is provided in the sixth line of the sixth section "that their lands shall not be subject to taxation or execution upon the judgment, order, or decree

of any court." That ought to be qualified so that they shall not be subject to taxation, judgment, &c., for a period of twenty-five years, because that will make it in harmony with the rest of the bill. . . .

11 Cong. Rec. 997 (1881).

Mr. DAWES. The matter which is involved in the lines on the third page, beginning with the proviso in the fifty-fourth line of section 1, has been discussed several times in the Senate; and to obviate all question about it, to reach precisely what is sought for in that proviso and at the same time avoid any question about the right of the State to tax this land so held by an Indian in severalty, I have prepared a substitute for the proviso, which I have shown to several members—not all, for I have not had time—of the Committee on Indian Affairs, and which I think will commend itself to the Senate. Therefore I move to strike out that proviso and insert what I send to the desk.

The ACTING SECRETARY. It is proposed to strike out, after the word "act," in line 54 of section 1, the following proviso:

Provided, That the title to lands acquired by Indians under the provisions of this act shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or this order of any court, but shall be and remain inalienable and not subject to taxation, lien, or incumbrance for any purpose for a period of ten years from the date of patent, and until such time thereafter as the President may see fit to remove the restriction, which conditions shall be expressed in the patent.

And in lieu thereof to insert:

Which shall be of the legal effect, and declare that the United States does and will hold this land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment

shall have been made; or, in case of his decease, of his heirs, according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharge of said trust and free of all charge or incumbrance whatsoever.

Mr. DAWES. That, in short, Mr. President, provides that the United States shall hold the title itself to this particular severalty, but in trust for the sole use and benefit of each Indian getting his land in severalty. The Indian, therefore, under the law will be to all intents and purposes the occupant of the land and enjoy all its use, and at the end of twenty-five years the United States will be obliged by the force of this provision to give him or his heirs a patent discharged of the trust and free of incumbrance. It will be impossible to raise the question of taxation under that provision, and that will secure to the Indian his rights in severalty precisely as the other provision would.

The amendment was agreed to.

13 Cong. Rec. 3211 (1882). (Umatilla Allotment Act.)

Mr. DAWES. I offer the same amendment which I offered to the bill that has just passed, to strike out the proviso on the fifth page, beginning at the third line of the fifth section, down to and including the eleventh line, and insert:

Which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs aforesaid in fee discharged of said trust and free of all charge or incumbrance whatsoever.

Mr. COKE. While I do not see the necessity of that amendment, I cannot perceive that it will do any harm, and am willing, as far as I am concerned, to accept it.

13 Cong. Rec. 3212 (1882).

Mr. CONGER. Before the bill goes over I wish to call the attention of the committee to one point to be considered before to-morrow morning. There is nothing said in the bill in regard to the taxation of this property. This alienable property of the Indians is distributed in all States and Territories where the lands lie, and there is an uncertainty in regard to the right of the State or Territory to tax the property. I think some provisions of that kind is worthy of the consideration of the committee.

Mr. DAWES. The bill protects the property of the Indians for twenty-five years. That is the limit. That is the intent of the bill.

Mr. CONGER. It does not say so in terms.

Mr. DAWES. It says so in absolute legal effect, because the United States is to hold the title. The title in fee remains in the United States for twenty-five years.

Mr. CONGER. But it is not to be inalienable for twenty-five years. I merely call attention to it. It seems to me there should be some provision by which this property could all be saved to the Indians and saved to them from any attempt at taxation.

15 Cong. Rec. 2242 (1884).

Mr. DOLPH. . . . We propose now to allot lands to them in severalty, and to make such lands inalienable for twenty-five years, and it is supposed that at the end of twenty-five years they will become capable of taking care of themselves. . . .

15 Cong. Rec. 2277 (1884).

Mr. COKE. . . . After providing that the patent shall be issued and shall convey the land in fee discharged of trusts at the end of twenty-five years, it reads:

Provided, That the President may withhold the issuance of the patent in fee in any case for such further time as he may deem to be for the interests of the Indians. And the trust created in the original patent shall be and remain in full force until the patent in fee be issued.

If the condition of affairs exists at the expiration of twenty-five years feared by the Senator from California, here is ample discretion reserved to the President of the United States to apply the proper remedy, and that is to withhold the patents. I think that is an abundant answer to the objection the Senator has made.

15 Cong. Rec. 2278-2279 (1884).

Mr. DAWES. . . . But as to the individual allotments the term is fixed at twenty-five years. It is fixed for several reasons. One is that the holding of land by the United States so that it can not be taxed in any community, for any unnecessary period of time, is irksome and unwise, unless there be some good reason for it. The allotment patent which is to issue after twenty-five years is only to issue to such Indians as in the opinion of the Interior Department are so far advanced in the outset as to give hope and encouragement that by this process they will be self-supporting at the end of twenty-five years from that time and be able to stand upon their own feet. I know the Senator would desire that the moment an Indian, like any white man, is able to take care of himself he should be free to dispose of his property like any white man. . . .

Mr. COKE. . . . The President must find these facts recited in this section of the bill to be true before he can put the machinery of this bill in motion. Then he must get the consent of two-thirds of each tribe before it operates upon that tribe. Then when the lands are surveyed patents are issued promising a fee-simple title to the Indians at the end of twenty-five years. At the expiration of that time, if there are any conditions surrounding the Indians which make it in the judgment of

the President improper that they should have the fee-simple title to the land, the President is authorized to withhold patents for an indefinite time. . . .

15 Cong. Rec. 2279 (1884).

Mr. DAWES. . . . Under a subsequent part of the bill the United States is to give him a patent, by which the United States covenants to hold for him for twenty-five years in trust this particular 160 acres, and at the end of twenty-five years to give him or his heirs a patent in fee.

17 Cong. Rec. 1630 (1886).

Mr. SKINNER. . . . Or shall he be converted into a civilized tax-payer, contributing toward the support of the Government and adding to the material prosperity of the country? . . . in addition thereto, his land is made inalienable and non-taxable for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man. . . .

17 Cong. Rec. 190 (1886).

Mr. PERKINS. . . . It has the warm indorsement and approval of the Secretary of the Interior, of the Commissioner of Indian Affairs, and of all those who have given attention to the subject of the education, the Christianization, and the development of the Indian race. . . . The bill provides for the breaking up, as rapidly as possible, of all the tribal organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship. . . .

For that reason, as I have suggested, it meets the warm approval of all the Government officers whose duties bring them in close contract with the Indians, and it has also the indorsement of the Indian rights associations throughout the country, and of the best sentiment of the land. . . .

18 Cong. Rec. 191 (1887).

Mr. DOLPH. . . . Do I understand that the changes made by the House amendments and the conference committee permit a lien or disposition of lands that shall be allotted to Indians in severalty after the lapse of a less period than that provided in the bill as passed by the Senate—twenty-five years? Also, do I understand that the provision inserted in the bill in the Senate—

Mr. DAWES. Will the Senator put his first interrogatory again?

Mr. DOLPH. My question is whether such changes have been made in the bill that instead of the bill as it passed the Senate providing that the land which shall be allotted to Indians in severalty can only be disposed of or be subject to liens after a period of twenty-five years, it now allows that to be done after five years?

Mr. DAWES. No, that has not been changed, except in this way, that the President may, in his discretion in any particular case, extend the time after the twenty-five years. The time limiting the power of alienation is not reduced at all, but has this further extension in the discretion of the President as to any particular case.

Mr. DOLPH. According to the conference report, when are patents to issue to the individual Indians?

Mr. DAWES. If the Senator will get the bill he will see. As soon as the individual Indian takes up his allotment he is to have a patent which shall be of the legal effect that the United States holds in trust this particular tract of land for the sole use and benefit of the particular Indian for the period of twenty-five years, at the end of which time the United States is to give him a patent in fee of the land; and then to that is added a provision that in any particular case the President may extend that twenty-five years' limit so that the United States shall in that particular case hold the land in trust for the Indian a further time.

18 Cong. Rec. 973 (1887).

FIFTY-NINTH CONGRESS

SESS. 1. CH. 2348 1906

[182] CHAP. 2348.—An Act To amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized

life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such [183] Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indians, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Approved, May 8, 1906.

CONGRESSIONAL RECORD INDEX

H.R. 11946

H.R. 11946—

To amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Mr. Burke of South Dakota; Committee on Indian Affairs 1110.—Reported back with amendment (H.R. REPORT 558) 2812.—Debated, amended, and passed House 3598, 3602.—Referred to Senate Committees on Indian Affairs 3668.—Reported back with amendments (S. REPORT 1998) 4153.—Passed over 5189, 5605.—Debated, amended, and passed Senate 5805.—House concurs in Senate amendments 5980.—Examined and signed 6089, 6100, 6233.—Approved by President 7795.

CONGRESSIONAL RECORD—HOUSE

JANUARY 15

* * *

[1110] By Mr. BURKE of South Dakota: A bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"—to the Committee on Indian Affairs.

* * *

FEBRUARY 21

[2812] Mr. BURKE of South Dakota, from the Committee on Indian Affairs, to which was referred the bill

of the House (H. R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," reported the same with amendment, accompanied by a report (No. 1558); which said bill and report were referred to the Committee of the Whole House on the state of the Union.

* * *

MARCH 9

ALLOTMENT OF LANDS TO INDIANS

[3598] Mr. BURKE of South Dakota. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H. R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Terri- [3599] tory to which they may reside;

and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up with said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

With the following amendments:

Page 1, line 6, strike out "twenty-five years or."

Page 2, line 1, strike out "thereafter, if the period has been extended by the President."

Page 2, line 2, before the word "and" insert "the trust period."

At the end of the bill add: "*Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The SPEAKER. Is there objection?

Mr. FINLEY. Mr. Speaker, I reserve the right to object.

Mr. STEPHENS of Texas. Mr. Speaker, I desire to ask the gentleman from South Dakota if the Committee on Indian Affairs has reported this bill; and if not, what committee did it come from?

Mr. BURKE of South Dakota. Mr. Speaker, I desire to say that the Committee on Indian Affairs has made a unanimous report on this bill, and it has the favorable report of the Department. It provides, first, to change the present Indian allotment law, so that an Indian when he takes an allotment does not become a citizen until he gets a fee simple patent. It also provides that the Secretary of the Interior may grant a fee simple patent when, after investigation, he becomes satisfied that the Indian has reached such a state of advancement and civilization that he is capable of managing his own affairs, and the gentleman from Texas ([Mr. STEPHENS] will recall that yesterday this matter was discussed in explanation of why there were so many of these individual cases in the Indian appropriation bill. The practice of the committee has been to put in such cases as might be recommended by the Department, and only such cases, and my recollection is that this provision was in one or more appropriation bills and passed the House at the last session, but that it went out in the Senate.

Mr. STEPHENS of Texas. Is the gentleman aware of the fact that the present Secretary of the Interior is holding up numerous applications for patents at the present time and is not issuing them, no demands having been made, and the allottees are entitled to them, and does he not think this might result in indefinitely preventing these people from becoming citizens of the State in which they live if the bill is passed?

Mr. BURKE of South Dakota. I think not, Mr. Speaker; and as I indicated to the gentleman yesterday, I think the original allotment law did not contemplate

that citizenship would go with the mere allotment of land. Of course this bill will not affect the status of any Indian allottee who has taken an allotment prior to this time.

Mr. STEPHENS of Texas. The gentleman will admit it affects his citizenship. He can not become a citizen until the Secretary of the Interior will permit him to become a citizen by issuing to him a patent.

Mr. BURKE of South Dakota. It does not affect the status as to citizenship of Indians who have taken allotments previous to the time when this becomes a law.

Mr. STEPHENS of Texas. Then what reason have you that this should become law?

Mr. BURKE of South Dakota. For this reason: Take it in my State, for instance, the Indians that have not yet received allotments and to whom allotments are now being made are the Indians in the remote portions and reservations that are commonly known as "blanket Indians," and they do not possess one single qualification entitling them to citizenship, and yet it is desirable that the lands be allotted to them. If citizenship goes with allotment, then I do not think there will be any allotment to any such Indians in the future.

Mr. FITZGERALD. I would like to make an inquiry. This bill, if I understand it correctly, makes two changes in the present law. First, it gives to the Secretary of the Interior power to issue patents, regardless of the twenty-five-year restriction, whenever he deems it proper.

Mr. BURKE of South Dakota. Yes, sir.

Mr. FITZGERALD. And, secondly, it changes the law so that the mere allotment of land to an Indian does not confer citizenship upon him.

Mr. BURKE of South Dakota. It leaves him subject only to the jurisdiction of the United States until he gets his fee simple patent.

Mr. FITZGERALD. Are those the only two changes?

Mr. BURKE of South Dakota. Those are the only changes.

Mr. CRUMPACKER. Under the law as it now stands the Secretary of the Interior does not have authority to issue fee simple patents to Indians whom he may conclude are entitled to them?

Mr. BURKE of South Dakota. That is true.

Mr. CRUMPACKER. And if this bill should become a law Congress would still have the power to issue patents in special cases notwithstanding the authority conferred upon the Secretary of the Interior.

Mr. BURKE of South Dakota. Congress would certainly have that power.

Mr. CRUMPACKER. I observed in the Indian appropriation bill that was up for consideration yesterday a number of pages of authority granted to the Secretary of the Interior to issue patents to numerous Indians. Those provisions occupied several pages in the bill, and it struck me that this kind of a law ought to be enacted in order to avoid the necessity of Congressional action in relation to these several cases. I suppose the recommendation of the Committee on Indian Affairs is guided almost entirely by the recommendations of the Interior Department?

Mr. BURKE of South Dakota. Entirely so; and all such provisions as appear in the Indian appropriation bill might go out on a point of order. Now I yield to the gentleman from Wyoming.

Mr. MONDELL. Mr. Speaker, I just came into the House and did not hear the discussion on the bill. As I understand it, at the present time all Indian patents are issued with a non-alienation clause, and that for the time within which the lands are not alienable the Indians, under this bill, would not become citizens.

Mr. BURKE of South Dakota. Not Indians who may take allotments after the passage of this act. It does not affect the status of any Indian who has taken an allotment when it has been approved by the Secretary of the Interior.

Mr. MONDELL. However, it will give the Secretary of the Interior power to withhold indefinitely final patents in fee simple and enable him to deprive them of citizenship.

Mr. BURKE of South Dakota. Not at all. Mr. Speaker, because of the absence of this change in the law they can not obtain a fee simple patent until the expiration of twenty-five years and unless Congress by special act grants them that privilege. The practice has been that in such cases we have granted the privilege on the recommendation of the Secretary of the Interior.

Mr. MONDELL. Under existing law, Mr. Speaker, the Indian becomes a citizen, as interpreted by the court, when he receives his allotment. I believe I am correct in that statement.

Mr. BURKE of South Dakota. That is the holding in the Supreme Court of the United States in the case of Heff.

Mr. MONDELL. Now, under this legislation the Indian remains the ward of the Government for twenty-five years after he takes his allotment, unless in the meantime the Secretary of the Interior sees fit to make him a citizen by granting him a patent in fee simple.

Mr. BURKE of South Dakota. Except that Congress may grant that privilege if it sees fit.

Mr. CURTIS. And, further, the agreement might provide that the title should become absolute or a fee simple title should pass, say, in ten years.

Mr. MONDELL. Yes; but—

Mr. CURTIS. The main advantage of this bill is that under existing law the Supreme Court has held that after a patent has issued (the court said the word "patent" was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express), notwithstanding the Indian does not secure a title in fee for twenty-five years, he becomes a citizen of the United States, and that the State courts have full jurisdiction over him, but not over his property.

They can not assess and tax the lands, nor can a State enact a law which will prevent the Government, at the time agreed, conveying the allottee the land in fee. Now, this bill, if enacted, will leave him under the control of the Government until he secures a patent conveying the fee, whether he gets it under an agreement or whether it is issued to him under the law by the Secretary of the Interior. The Supreme Court held that the Indians to whom allotments were made under the act of 1887 were still wards of the nation, in a condition of pupillage or dependency.

[3680] Mr. MONDELL. In other words, Mr. Speaker, this legislation retains the Indian in his condition as a ward of the nation without rights of citizenship for twenty-five years after he receives his allotment. Whereas under present conditions he becomes a citizen upon receiving his allotment. Is not that a fair statement of the situation?

Mr. CURTIS. That is true, unless, as I said a moment ago, the agreement provides that the fee should pass in a shorter time.

Mr. MONDELL. If there is some special provision in a particular piece of legislation. Generally this puts off for twenty-five years the time in which an Indian may become a citizen of the United States.

Mr. CURTIS. Yes, sir—that is, by the mere taking of an allotment.

Mr. MONDELL. I understand.

Mr. CURTIS. He may become a citizen of the United States any minute he desires by leaving the reservation and taking up a residence apart from any tribe of Indians and adopting the habits of civilized life.

Mr. MONDELL. Under this law, however, if he does accept an allotment—and of course every Indian residing on a reservation will take an allotment, or ought to do so—he can not become a citizen within twenty-five years unless the Secretary of the Interior in the meantime shall issue him a patent in fee simple.

Mr. BURKE of South Dakota. Mr. Speaker, let me say to the gentleman he does not become a citizen on taking an allotment until it is approved by the Secretary of the Interior. So the Secretary of the Interior now has it within his power to withhold citizenship; yet the Indian may take an allotment.

Mr. MONDELL. Mr. Speaker, is a point of order pending?

Mr. FINLEY. Mr. Speaker, I reserved the point of order against the bill.

Mr. BURKE of South Dakota. Mr. Speaker, I yield to the gentleman from Montana for a question.

Mr. DIXON of Montana. Mr. Speaker, I want to ask the gentleman from South Dakota [Mr. BURKE] if the purpose of the bill is not to prevent the blanket Indians by wholesale becoming citizens by allotment, and still allow the intelligent Indians on application to become citizens by allotment?

Mr. BURKE of South Dakota. That is the purpose of the law, and, further, to protect the Indians from the sale of liquor.

Mr. CURTIS. It is a very great improvement over existing law.

Mr. DIXON of Montana. I thoroughly concur.

Mr. BURKE of South Dakota. It is in accordance, in my opinion, with what the original allotment law contemplated, and what was considered to be the law until the decision of the Supreme Court last April held otherwise.

Mr. DIXON of Montana. I know a case where the reservation assumed to be open where, under the decision of the Supreme Court, there is no way on earth to prevent the wholesale sale of whisky to those allotted Indians. Under this bill it will stop the sale of it to the blanket Indians.

Mr. FINLEY. Where are the Indians located who will be affected by this bill?

Mr. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

Mr. FINLEY. Within all the States and Territories? What Indians?

Mr. BURKE of South Dakota. The South Dakota Indians probably more than any others. I understand the application of the present law has been held not to apply to Territories.

Mr. FINLEY. Will this bill apply to Indians in the Indian Territory?

Mr. BURKE of South Dakota. I think it would; yes, sir; though I am not sure that I am familiar with the general allotment law as to whether it applies to Indians within the Indian Territory or not.

Mr. FINLEY. In the Indian Territory?

Mr. BURKE of South Dakota. I have said I thought it would, but that I am uncertain.

Mr. FINLEY. Then to that extent it would affect the Indian Territory Indians, would it not?

Mr. BURKE of South Dakota. It would affect no Indian who had taken his allotment.

Mr. FINLEY. To what extent have the Indians in the Indian Territory not taken allotments?

Mr. BURKE of South Dakota. I will yield to the gentleman from Kansas, who is more familiar with that than I am.

Mr. CURTIS. So far as the Indian Territory is concerned, all the Indians have been made citizens of the United States, and they are citizens now. The allotments have all been made to the Seminoles; nearly all to the Creeks. They are being made to the Chickasaws, the Choctaws, and the Cherokees.

Mr. FINLEY. How many Indians in the Indian Territory have received their allotment?

Mr. CURTIS. That would be very hard to say. There are about 4,000 allotments yet to be made to the Choctaws and Chickasaws, but the patents have not been delivered to those who have been allotted in those two

tribes; nearly 7,000 patents have been delivered to members of the Cherokee tribe; nearly all patents have been delivered to the members of the Creek tribe, and allotments are complete among the Seminole tribe.

Mr. FINLEY. Would not the passage of this bill have the effect of delaying it?

Mr. CURTIS. It would not have that effect in the Indian Territory, because they were not included in the act of 1887; and the Government has made special agreements with the five tribes in the Indian Territory, and this law would in no way affect them.

Mr. FINLEY. I understood the gentleman from South Dakota to say a moment ago that it would apply to the Indians in the Indian Territory.

Mr. BURKE of South Dakota. I stated I did not know, and I yielded to the gentleman from Kansas, who did.

Mr. CURTIS. This law never applied to the Indian Territory.

Mr. FINLEY. Then I understand it does not apply to the Indians in the Indian Territory?

Mr. BURKE of South Dakota. It seems not.

Mr. KEIFER. I wish to ask the gentleman a question or two.

Mr. BURKE of South Dakota. I yield to the gentleman.

Mr. KEIFER. I want to know what there is in the bill that he has prepared that excludes it from general operation upon the Indian tribes in the Indian Territory.

Mr. BURKE of South Dakota. The gentleman from Kansas has just explained, I thought, that particular point.

Mr. KEIFER. A general law is likely to apply generally. Is there any reservation in this bill?

Mr. CURTIS. Not in this bill; this is simply an amendment to section 6 of the act of 1887. The act of

1887 excludes the Indians of the Indian Territory. Now, there is nothing in this bill bringing them within its terms. Therefore the two acts would be construed together, and under the rules of law it would be held that the original act not applying to the Indians in the Indian Territory, this act amending it would not apply to them. Now we have special agreements with the five tribes, under which allotments are being made to them. We have a bill pending, which will go to conference within a day or two, providing for final settlement of all their affairs. We have special provisions in the various agreements in regard to the sale of intoxicating liquors which have not been put in other agreements with Indians in the United States, and they have always been dealt with separately and distinctly. The agreements provide the conditions under which the deeds or patents shall be issued, which shall be subject to alienation and when they may be alienated; that homesteads shall not be disposed of for certain periods. As this bill only affects Indians with whom agreements are hereafter to be made, it can not under any circumstances apply to the members of the Five Civilized Tribes.

Mr. MONDELL. I fail to find any feature in your bill, from a hasty examination of it, that limits its provisions—

Mr. BURKE of South Dakota. Read the first line of the bill—

Mr. MONDELL (continuing). To future agreements with Indians.

Mr. CURTIS. I have heard the bill read and as I understand it, it only applies to agreements hereafter to be made.

Mr. BURKE of South Dakota. It only amends section 6 of the act of 1887.

Mr. KEIFER. The gentleman from Kansas makes a clear statement as to the existing law as to how it would apply, but the general rule is—

Mr. ADAMS of Pennsylvania. Mr. Speaker, I make the point of order that we can not hear.

The SPEAKER. The House will be in order.

Mr. BURKE of South Dakota. I yield to the gentleman from Ohio.

Mr. KEIFER. Not for any particular time. I was going to say to the gentleman from Kansas that the general rule is that a general law will repeal or supersede another general law unless there is some reservation against it, and it looks to me as though now, to avoid confusion, you better put some reservation in this bill if there is none there now.

Mr. BURKE of South Dakota. Let me state to the gentleman from Ohio that we have this proviso on the bill:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

[3601] Now, we certainly can not legislate to change the status of any citizen whose status has been fixed, and the Supreme Court in the Heff case state that we have not that right without the consent of the citizen to be affected and the consent of the State within which he resides.

Mr. KEIFER. I have no objection to that statement, but it does not cover the objection. It applies only to conditions that are already fixed; but there are cases that are to come, of applications to be made, allotments to be made in the future, and this may embarrass conditions existing in the Indian Territory; and no matter "whether there is a reservation in the act of 1887 or not, there is no reservation in this, and that is what I suggest—that the gentleman put in such a reservation. I am not opposing the bill.

Mr. CURTIS. A very few words would cover it, simply providing that the provisions of this act shall not extend to the Indians in the Indian Territory.

Mr. KEIFER. I suggest that had better be put in, so as to avoid any confusion.

Mr. FITZGERALD. I think the gentleman from Ohio entirely misunderstands this bill. The act of 1887—the general allotment act—which is known as the “Dawes Act,” authorized the President to allot lands to Indians, excepting from the operations of the act the lands of the Five Civilized Tribes.

Mr. KEIFER. That has been stated over and over again; but this bill does not except from that, and that is the trouble. The gentleman comes in without having heard the discussion——

Mr. FITZGERALD. If the gentleman will wait a moment, he will find out that I not only have heard the discussion, but that I understand this, which he does not.

Mr. KEIFER. That is the gentleman's ipse dixit about it.

Mr. FITZGERALD. This bill which is now offered amends one section of the general allotment act. Does the gentleman contend that one section of that act, by being amended, repeals the reservation contained in the first part?

Mr. KEIFER. Certainly not. It does not affect that so far as it relates to the original act; but it does take the place, probably, of the act and gives a general application.

Mr. BURKE of South Dakota. I yield to the gentleman from Kansas [Mr. CURTIS] for the purpose of suggesting an amendment.

Mr. CURTIS. Mr. Speaker, I suggest the following amendment:

Provided further, That the provisions of this act shall not extend to the Five Civilized Tribes.

Mr. LACEY. In the Indian Territory.

Mr. CURTIS. In the Indian Territory.

The SPEAKER. Is there objection to the consideration of the bill?

Mr. FINLEY. One moment. I understood the gentleman from South Dakota to say as to these blanket Indians that parties could go in under the laws of the United States and sell them intoxicating liquors. Is that true?

Mr. BURKE of South Dakota. Under the decision in the Heff case, if liquor is sold to an Indian and the Indian happens to be an allottee, the person selling the liquor to him can not be prosecuted under the laws of the United States which prohibit the sale of liquor to the Indians.

Mr. FINLEY. To what extent will this bill cut off the present or prospective right of suffrage from the blanket Indians?

Mr. BURKE of South Dakota. I can only answer that question by guessing at the number of Indians who have not taken their allotments, and I have endeavored to get that information.

Mr. FINLEY. Will it cut off the right of suffrage from any of the blanket Indians?

Mr. BURKE of South Dakota. Yes; I think it will.

Mr. CURTIS. None who have it now.

Mr. BURKE of South Dakota. It will not affect any who now enjoy that privilege.

Mr. FINLEY. But it will prevent the extension of the privilege to blanket Indians in the future until such time as they receive their patents.

Mr. BURKE of South Dakota. Yes.

Mr. FINLEY. And the gentleman is of the opinion that the blanket Indians as a rule are unfit for the exercise of suffrage?

Mr. BURKE of South Dakota. I most certainly am of that opinion.

Mr. STEPHENS of Texas. In what respect will it prevent the sale of whisky on the reservations to these Indians?

Mr. BURKE of South Dakota. I do not know that it will have any particular effect, because if liquor is sold now on the reservations it is a violation of the law.

Mr. STEPHENS of Texas. I would like to ask the gentleman if he can not frame an amendment that would protect them from being sold whisky when they are at the Capitol. [Laughter.]

Mr. BURKE of South Dakota. I do not think they have any right to sell liquor here or anywhere else to the Indians. I will yield to the gentleman from Minnesota.

Mr. STEENERSON. I understand the object of this bill is to apply to those Indians who hereafter, after the passage of this proposed act, shall be allotted lands in severalty?

Mr. BURKE of South Dakota. Yes.

Mr. STEENERSON. That the mere allotment of lands to such Indians in severalty shall not operate to make them citizens within the meaning of the liquor law?

Mr. BURKE of South Dakota. That is right.

Mr. STEENERSON. It can not affect those who already enjoy the high privilege of purchasing liquor?

Mr. BURKE of South Dakota. Certainly not.

Mr. STEENERSON. I understand further that in the proviso to this bill it is provided for granting lands in fee without any restriction; that that provision is not limited. That applies to all Indians anywhere that have allotments?

Mr. BURKE of South Dakota. It does.

Mr. STEENERSON. And is operative whether allotment has already been made or will be made in the future?

Mr. BURKE of South Dakota. Yes. Now I will yield to the gentleman from Wyoming.

Mr. MONDELL. Mr. Speaker, I would like to ask the gentleman from South Dakota in what manner this bill affects the status of Indians to whom allotments have been made at this time and who have heretofore enjoyed the privileges of citizenship?

Mr. BURKE of South Dakota. I will answer the gentleman's question by stating that it does not affect such

Indians any more than it affects the Members of this House so far as the question of citizenship is concerned.

Mr. MONDELL. Well, Mr. Speaker, that is a pretty strong statement. The Indian to whom allotment has been made has heretofore been held to be a citizen and granted the right to vote in certain localities. I do not understand that he has been allowed that privilege in all of the States. That privilege has not been exercised in the past by reason of any legislation clearly denominating him a citizen, as I understand it, but by interpretation. Now, we provide in this statute that during the trust period, which is twenty-five years, the Indian may not exercise the rights of citizenship and is not subject to the laws of the State or Territory in which he resides.

The gentleman from South Dakota is a lawyer, I believe, and I am not, but in my mind there is some question—and I want to know if that matter has been carefully considered—as to whether by any possibility this statute could affect the status of Indians who have heretofore been considered, by reason of being an allottee, entitled to the rights of citizenship.

Mr. BURKE of South Dakota. That question has been carefully considered. I think the gentleman is confused in his mind by the belief that because an Indian has the right to vote within a State that therefore he is a citizen; but a man may be a citizen of a State and not be a voter.

Mr. MONDELL. I am not confused on that point. It is true, however, that many Indians have been considered citizens, some of whom have exercised the right of franchise and some of whom have not. I simply want to be satisfied that this legislation would not affect the status of these men who have heretofore been exercising the rights of citizenship.

Mr. BURKE of South Dakota. I am positive, Mr. Speaker, that it does not.

Mr. CRUMPACKER. This bill does not affect the status of the voter. That is one of the rights of citizenship; that is fixed by the State itself. In Indiana we

allow a man to vote who is not a Citizen of the United States. An alien who has lived in the State one year, who has declared his intentions to become a citizen, can vote at all elections, but he will not be a citizen for five years; so the question of the voting status of Indians under the law as it exists can not be affected by this bill one way or the other.

Mr. MONDELL. I want to call attention to the fact that Indians have been allowed to vote on the theory that they were citizens and therefore entitled to vote.

Mr. CRUMPACKER. That is in your own State under the State law?

Mr. MONDELL. By reason of the fact of their being citizens of the United States.

Mr. CRUMPACKER. No Congress could take away a right to vote that is granted in your State by any kind of legislation that it could pass.

[3602] Mr. MONDELL. Mr. Speaker, upon the statement of the gentleman from South Dakota [Mr. BURKE] that in the opinion of the members of the committee the bill does not affect the status of Indians to whom allotments have heretofore been made, I have no objection to the legislation.

Mr. KEIFER. Mr. Speaker, the amendment offered by the gentleman from Kansas [Mr. CURTIS] I think has not been reported.

The SPEAKER. The Clerk will report the amendment.

The Clerk read as follows:

Add, at the end of the bill, the following: "*And provided further, That the provisions of this act shall not extend to the Five Civilized Tribes.*"

The SPEAKER. The question is on agreeing to the amendments.

The question was taken, and the amendments were agreed to.

The SPEAKER. The question now is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time; read the third time, and passed.

On motion of Mr. BURKE of South Dakota, a motion to reconsider the last vote was laid on the table.

. . . .

CONGRESSIONAL RECORD—SENATE.

March 12

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[3668] HOUSE BILLS REFERRED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was read twice by its title, and referred to the Committee on Indian Affairs.

. . . .

[4153] REPORTS OF COMMITTEES

. . . .

Mr. GAMBLE, from the Committee on Indian Affairs, to whom was referred the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," reported it with amendments, and submitted a report thereon.

. . . .

[5189] ALLOTMENT OF LANDS TO INDIANS

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the

various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was announced as the next business in order on the Calendar.

[5190] Mr. McCUMBER. I ask that the bill may be passed over, retaining its place on the Calendar.

The VICE-PRESIDENT. At the request of the Senator from North Dakota, the bill will go over, retaining its place on the Calendar.

* * *

APRIL 20

[5605] ALLOTMENT OF INDIAN LANDS IN SEVERALTY

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was announced as next in order on the Calendar.

Mr. KEAN. I do not see the Senator from South Dakota [Mr. GAMBLE] who reported the bill in the Chamber at this time, and so I ask that the bill go over.

The VICE-PRESIDENT. The bill will go over, at the request of the Senator from New Jersey, without prejudice.

Mr. CLAPP subsequently said: In the absence of the Senator from South Dakota [Mr. GAMBLE] I should like to have the objection withdrawn to the consideration at this time of House bill 11946. The Senator from South Dakota who has the bill in charge is very anxious to have it passed. I hope the Senator from New Jersey will withdraw his objection.

[5606] Mr. KEAN. I do not know that I shall object to the bill, but I should like to have some explanation of it before it is passed. The title would indicate that it is a

bill of some importance and one which would give rise to debate.

Mr. CLAPP. I can make a very short statement in explanation of the bill.

Mr. KEAN. I have no objection to that.

The VICE-PRESIDENT. Does the Senator from New Jersey withdraw his objection to the present consideration of the bill?

Mr. KEAN. I withdraw the objection.

Mr. CLAPP. Mr. President, under the existing allotment law, when an Indian obtains his allotment he becomes a citizen, which divests the Federal Government of all authority over the Indian, have so far as there may be retained a restriction by the Government upon alienation of the allotment by the allottee. This has led to a most deplorable condition in many of the reservations. The purpose of this bill is to provide that in their future allotments the rights of citizenship shall not attach until the expiration of the trust period and the allottee obtains his patent. It is a bill in which the Department is vitally interested and one that should become a law.

The VICE-PRESIDENT. Objection being withdrawn, the bill will be read for the information of the Senate.

The Secretary read the bill; and by unanimous consent the Senate, as in Committee of the Whole, proceeded to its consideration.

Mr. HEYBURN. I should like to ask the Senator from Minnesota a question. I understand him to state that this bill provides that Indians shall only become citizens of the United States after the lapse of the time in which they might prove upon their lands. Is that it?

Mr. CLAPP. Yes.

Mr. HEYBURN. Then here is the condition that confronts us: We have in Idaho the Nez Perce Indians, for instance, and the Coeur d'Alenes, who were provided for the other day. Some of those Indians are now in the possession of full citizenship. Would this bill prevent those

that are not already within the limits of full citizenship from completing their citizenship?

Mr. CLAPP. Yes, sir; it would.

Mr. HEYBURN. Then it would bring two classes of Indians on the same reservation?

Mr. CLAPP. Yes, sir.

Mr. HEYBURN. At 12 o'clock in the day the Indians who had before noon complied with the law and taken their lands in severalty would have one status as citizens and those who did not happen to get in at that time would be shut off from citizenship under this proposed law. It seems to me that there should be some amendment that would prevent a condition where one portion of a tribe would be citizens of the United States and occupy a position above the other portion of the tribe. That would hardly result in harmony in that tribe. It would create an aristocracy of citizenship.

I am in favor of the general principle of the bill, provided it is amended so as to avoid those embarrassments, and they would be serious embarrassments to the two tribes in the State which I in part represent here, because just now their lands are in the process of being allotted.

Mr. CLAPP. Mr. President, the condition to which the Senator refers, I think obtains to-day upon every reservation in the United States under the existing law. A portion of a tribe who have had their allotments made under the existing law advance to certain rights of citizenship. Those who have not received their allotments do not reach that point in citizenship. The trouble under the existing condition is that when they bet their first allotments, their trust deeds, they become citizens. It is true that under this bill those who have heretofore taken their allotments will have the rights of citizenship, because no law that Congress could pass could to-day divest them of the rights which they have, but the bill will for the future cure the evil that is found on these reservations, where the Indians by merely receiving their allotments pass be-

yond the jurisdiction of the Federal Government. We can not avoid the condition to which the Senator referred, because under the existing law there are two classes.

Mr. HEYBURN. I am anxious to perfect the bill rather than to defeat it. Now comes this provision at the top of page 2:

Then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

There is a discrimination in that provision between Indians who live in the Territories and Indians who live in the States, which I doubt if the Senator who prepared this bill intended should exist.

Mr. CLAPP. I do not think it exists, because no State could pass such a law.

Mr. HEYBURN. Well, then, why provide, as is provided in this bill? Of course, a State can not pass such a law after the Indians do become citizens, but why provide that a Territory shall not pass any law denying the Indians within a Territory the equal protection of the law?

Mr. CLAPP. Because we are legislating now for the Territories and not for the States. A State could not take away the rights of citizenship if it wanted to. We are legislating for the Territories, and provide in this bill that no Territory shall do it.

Mr. HEYBURN. Yes; but we use the words "State or Territory" in defining the laws to which they shall be subject in line 4, on page 2.

Mr. CLAPP. No, sir; we use the words "State or Territory" in defining the rights that the Indian attains to. The bill provides:

Every allottee shall have the benefit of and be subject to the laws, both civil and criminal——

Mr. HEYBURN. Well, he already is in a State.

Mr. CLAPP. Not unless he has got his allotment he is not.

Mr. HEYBURN. The bill says "every allottee." It has been held by the Supreme Court of the United States recently that every allottee has attained to citizenship and has those rights, of course. There was a doubt about this until a recent time, but it has been settled.

Mr. CLAPP. What would the Senator like to suggest in the way of amendment?

Mr. HEYBURN. I should like to have time to look the bill over and make a suggestion.

Mr. CLAPP. I do not wish to take up the time of the Senate with a discussion of this bill this morning.

Mr. McCUMBER. Let me call the attention of the Senator—

Mr. GALLINGER. I ask that the bill may go over.

Mr. McCUMBER. Let me call the attention of the Senator to one matter. We are simply repeating the law as it now stands with reference to the Indians, and what has been the law ever since 1887. This bill does not add to it, but, on the contrary, the exact language of the law of February 8, 1887, has been recopied into this bill; so that it will not affect the question whether it comes in again or whether it does not.

Mr. HEYBURN. I should like to ask the Senator—

Mr. GALLINGER. I ask that the bill may go over.

The VICE-PRESIDENT. Under objection, the bill will go over without prejudice.

* * *

[5805] ALLOTMENT OF INDIAN LANDS IN SEVERALTY

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the

Indians, and for other purposes," was announced as next in order.

The VICE-PRESIDENT. On April 20 last the bill was considered as in Committee of the Whole, and was read.

The Senate, as in Committee of the Whole, resumed the consideration of the bill, which had been reported from the Committee on Indian Affairs with amendments.

The first amendment was, on page 3, line 2, after the word "removed," to insert "and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent;" so as to make the proviso read:

Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.

The amendment was agreed to.

The next amendment was, on page 3, line 8, to strike out the words "the Five Civilized Tribes" and insert "any Indians in the Indian Territory;" so as to make the additional proviso read:

And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory.

The amendment was agreed to.

Mr. CLAPP. I desire to offer an amendment to the bill.

The VICE-PRESIDENT. The amendment will be stated.

The SECRETARY. Add at the end of the bill the following:

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expira-

tion of the trust period, said allotment shall be canceled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian and shall cause to be issued to said heirs and in their names a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

* * *

CONGRESSIONAL RECORD—HOUSE

April 27

* * *

[5980] ALLOTMENT OF LANDS TO INDIANS

The SPEAKER laid before the House the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians of the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," with Senate amendments.

The Senate amendments were read.

Mr. SHERMAN. Mr. Speaker, I move that the House concur in the Senate amendments.

The motion was agreed to.

On motion of Mr. SHERMAN, a motion to reconsider the last vote was laid on the table.

* * *

[6089] ENROLLED BILLS SIGNED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes;"

* * *

CONGRESSIONAL RECORD—SENATE

April 30

[6100] ENROLLED BILLS SIGNED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes;" and

* * *

CONGRESSIONAL RECORD—HOUSE

* * *

[6233] H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

* * *

[7795] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES

A message, in writing, from the President of the United States was communicated to the House of Representatives by Mr. BARNES, one of his secretaries, who also informed the House of Representatives that the President had approved and signed bills of the following titles:

On May 8, 1906;

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

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HOUSE OF REPRESENTATIVES

59th Congress, 1st Session

Report No. 1558

ALLOTMENT OF LANDS IN SEVERALTY TO CERTAIN INDIANS

February 21, 1906.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. BURKE, of South Dakota, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H.R. 11946]

The committee on Indian Affairs, to whom was referred House bill 11946, submit the following report:

The committee have amended the bill and, as amended, recommend that it do pass.

The amendments adopted are as follows:

In line 9, page 1, after the word "of," strike out the words "twenty-five years or," and strike out all of line 10, and insert in lieu thereof the words "the trust period."

In line 1, page 3, after the word "time," insert the word "to."

In line 4, page 3, after the word "removed," add an additional proviso, as follows:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

This bill proposes to amend the general Indian allotment law of 1887, and changes section 6 of said act so that hereafter, whenever an allotment of land is made to any Indian, citizenship will be withheld from such Indian during the trust period. It has generally been supposed that where Indians had taken allotments under the general allotting law that they were still wards of the nation and subject to the jurisdiction only of the United States, and in cases where persons were prosecuted for selling liquor to Indians the courts assumed jurisdiction, regardless of whether the Indians had taken an allotment or not, but upon April 10, 1905, the Supreme Court of the United States decided otherwise in a case entitled "Matter of Heff," reported in 197 U.S. Reports, page 488, the opinion of the court being by Mr. Justice Brewer.

In that case Heff was convicted in the district court of the United States in the district of Kansas, under an indictment for having sold certain intoxicating liquor to an Indian and a ward of the Government; upon conviction he was sentenced to imprisonment for a period of four months and to pay a fine of \$200 and the costs of the prosecution. He appealed, and the court of appeals of the eighth circuit sustained the decision of the district court, and he presented an application for a writ of habeas corpus to the Supreme Court. In effect the court holds that under the law, when an Indian takes an allotment, that he then becomes a citizen of the State or Territory in which he may reside and subject to the laws thereof, and is no longer a ward of the nation, subject to the police regulations on the part of Congress. In concluding the opinion the court says:

We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The district court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice Harlan dissented.

Since this decision was rendered there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians, and in the opinion of this committee it is advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States.

The bill also provides and authorizes the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and

no longer subject to the exclusive jurisdiction of the United States.

In the opinion of the committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

The bill is recommended very strongly by the Commissioner of Indian Affairs and the Secretary of the Interior, and the reports are herewith submitted and are as follows:

DEPARTMENT OF THE INTERIOR,

Washington, February 14, 1906.

Sir: I am in receipt of your letter of the 16th ultimo, inclosing H.R. 11946, being "A bill to amend section six of an act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'" and in reply to your request for a report I inclose herewith copy of a letter from the Commissioner of Indian Affairs, dated the 8th instant, in which he suggests several amendments, and says that "if the bill is clarified by the amendments suggested there appears to be no good ground for objecting to it. The provision for fee-simple patents is especially desirable legislation, and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method."

The views expressed by the Commissioner of Indian Affairs and the amendments suggested meet with my approval, and the passage of the bill is recommended.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

Washington, February 8, 1906.

SIR: I have the honor to acknowledge the receipt, by your reference of January 18, 1906, for report, of a letter from Hon. J. S. Sherman, chairman of the Committee on Indian Affairs, House of Representatives, who inclose a copy of H. R. 11946, entitled "A bill to amend section 6 of an act approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.'"

It changes section 6 to read as follows:

"That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits

of the United States to whom allotments shall have been made, and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

The act of February 8, 1887 (24 Stat., 388), known as the general-allotment act, provides that after approval of allotments the Secretary of the Interior "shall cause patents to issue therefor in the names of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period." * * *

Section 6 makes every Indian allottee under the act subject to the laws, both civil and criminal, of the State or Territory in which he may reside, immediately upon the issuance of a trust patent, and declares every Indian born within the United States, to whom an allotment shall have been made under any law or treaty, to be a citizen of the United States.

The bill under consideration postpones the time when an allottee taking lands after it is enacted is to become subject to the laws of the State or Territory of his residence and when citizenship is to be acquired until the issuance of the final or fee-simple patent—a period of twenty-five years, which may be indefinitely extended by the President.

Experience has demonstrated that citizenship has been a disadvantage to many Indians. They are not fitted for its duties or able to take advantage of its benefits. Many causes operate to their detriment. Some communities are too indifferent and others are financially unable to enforce the local laws where Indians are involved. The result is that the newly enfranchised people are free from any restraining influences. Degraded by unprincipled whites, who cater to their weaknesses, no protection is given them, because the United States courts have no jurisdiction and the local authorities do not enforce State laws.

The bill goes further, and makes ample provision to meet all cases where it would be for the best interest of the allottees to make citizens of them. It authorizes the Secretary of the Interior, in his discretion, "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

This provision is perhaps the most important in the bill. It is a long step in the right direction, and the great

need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and to take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned. Through superintendents, agents, inspectors, and other officers the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant.

In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but as a fundamental principle of good government, special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.

The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period during which any who have both the ability and the ambition may prepare themselves for the desired change.

It may be argued that the bill leaves in some doubt the status of those Indians who will be allotted after it becomes law. In cases where the surplus lands are re-

tained and the reservation boundaries kept intact the allottees would doubtless continue wards of the Government and be subject only to the laws of the United States; whereas if the surplus lands be opened to settlement and the reservation substantially abolished, the question of jurisdiction might become a serious one. It would therefore, perhaps, be well to add the following proviso:

"Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The first part of amended section 6 will not make allottees subject to the laws of the State in which they reside in any case until the expiration of twenty-five years. The proviso to that section contemplates the shortening of the trust period and removes all restrictions as to the sale, incumbrance, or taxation on the issuance of a fee-simple patent. A previous provision of the section makes such patentees citizens of the United States. Although it would probably be held that a person who becomes a citizen of the United States thereby becomes subject to the laws of the State of which he is a resident. I think it would be wiser to remove all doubt by amending the first section by striking out the words "twenty-five years or thereafter, if the period has been extended by the President," and insert in lieu thereof the words "the trust period." Line 1, on page 3, also should have the word "to" inserted after the word "time."

If the bill is clarified by the amendments suggested there appears to be no ground for objecting to it. The provision for fee-simple patents is especially desirable legislation and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible

method. It is therefore most heartily recommended that this bill receive your approval.

Very respectfully,

F. E. LEUPP, *Commissioner.*

The SECRETARY OF THE INTERIOR.

59th Congress
1st Session

Report
No. 1998

SENATE

ALLOTMENT OF LANDS IN SEVERALTY
TO CERTAIN INDIANS

MARCH 23, 1906.—Ordered to be printed.

Mr. GAMBLE, from the Committee on Indian Affairs,
submitted the following

REPORT.

[To accompany H.R. 11946.]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," report the same and recommend that the same do pass with the following amendments:

On page 3, in line 4, after the word "removed," insert the following "and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

On page 3, in lines 8 and 9, strike out the following: "Five Civilized Tribes," and insert in lieu thereof the following: "any Indians in the Indian Territory."

[Balance of Report same as H. Rep. No. 1558, *supra*.]

[EMBLEM]

THE SECRETARY OF THE INTERIOR

Washington

May 8, 1990

Honorable George S. Mickelson
Governor of South Dakota
Pierre, South Dakota 57501

Dear Governor Mickelson:

I am sorry it has taken me so long to answer your letter of March 28, 1990, regarding the lawsuit the United States plans to file against South Dakota and Todd County to prevent further taxation of Indian-owned fee lands on the Rosebud Reservation.

As you know, this issue is very contentious. Thus, before I responded I wanted to be sure I understood all the legal implications. My research indicates that two state courts have ruled that such lands are exempt from state taxation. An opinion from our Associate Solicitor, Division of Indian Affairs, reaches the same conclusion. On the other hand, state and county taxing officials in Washington, Montana and Wyoming support the position you are taking in South Dakota. Also supporting your position is the recent opinion from the Ninth Circuit in the case involving the Yakima Tribe in Washington. The United States has filed a brief in that case supporting the Tribe's petition for a rehearing.

You have requested that I reverse the decision of the Solicitor to ask the Justice Department to file suit against South Dakota and Todd County. Governor, I believe that this issue cries out for clarification, and it would be best to let the courts decide this issue once and for all. I believe that sooner or later it will end up in the

Supreme Court and we might as well settle it sooner rather than later. For that reason I believe we should proceed with the litigation.

Thank you for your interest in this matter.

Sincerely,

/s/ Manuel Lujan, Jr.

JUL 1 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Cross-Petitioner,
v.

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR LA PLATA COUNTY, COLORADO;
BANNOCK COUNTY, LEWIS COUNTY AND POWER
COUNTY, IDAHO; BECKER COUNTY AND MAHNOMEN
COUNTY, MINNESOTA; BLAINE COUNTY, FLATHEAD
COUNTY, GLACIER COUNTY, LAKE COUNTY AND
ROOSEVELT COUNTY, MONTANA; THURSTON
COUNTY, NEBRASKA; MOUNTRAIL COUNTY AND
SIOUX COUNTY, NORTH DAKOTA; CORSON COUNTY,
DEWEY COUNTY, LYMAN COUNTY, TODD COUNTY
AND ZEIBACH COUNTY, SOUTH DAKOTA; DUCHESNE
COUNTY, UTAH; AND FREMONT COUNTY, WYOMING,
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. The General Allotment Act Clearly Authorized the Taxation of Fee Patent Land	3
II. The General Allotment Act Was Clearly Under- stood to Authorize the Taxation of Fee Patent Land	15
III. The General Allotment Act Has Been Consist- ently Construed to Clearly Authorize the Taxa- tion of Fee Patent Land	22
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
<i>Bailess v. Paukune</i> , 344 U.S. 171 (1952)	26, 27
<i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939)	24, 26
<i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 100 F.2d 929 (1938), modified, 308 U.S. 343 (1939)	14
<i>Brendale v. Confederated Tribes & Bands of Yakima Indian Nation</i> , 109 S. Ct. 2994 (1989) ..	2, 30
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	30
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979)	26
<i>Draper v. United States</i> , 140 U.S. 240 (1891)	22
<i>Duro v. Reina</i> , 110 S. Ct. 2058 (1990)	16
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	22
<i>Mahnomen County v. United States</i> , 819 U.S. 474 (1943)	26
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	30
<i>Nichols v. Rysavy</i> , 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987)	15, 26
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	21
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	27
<i>United States v. Mason</i> , 412 U.S. 391 (1973)	27, 28
<i>United States v. McCurdy</i> , 246 U.S. 263 (1918)	23, 24
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980) ..	4, 28, 29, 30
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	23, 24
<i>United States v. Rickert</i> , 188 U.S. 432 (1903)	22
CONGRESSIONAL MATERIALS:	
11 Cong. Rec. (Excerpts) (1881)	4
13 Cong. Rec. 3211 (1882)	4
15 Cong. Rec. 2242 (1884)	5
38 Cong. Rec. 2830 (1904)	5
67 Cong. Rec. (Excerpts) (1926)	8, 9
68 Cong. Rec. 4892 (1927)	9
74 Cong. Rec. (Excerpts) (1931)	9, 11
84 Cong. Rec. 34 (1929)	12
86 Cong. Rec. (Excerpts) (1940)	14, 15
General Allotment Act of 1887 (24 Stat. 388)	passim

TABLE OF AUTHORITIES—Continued

	Page
Burke Act of 1906 (34 Stat. 182)	5
S. Rep. No. 68, 61st Cong., 2d Sess. (1910)	6
S. Rep. No. 536, 69th Cong., 1st Sess. (1926)	8
S. Rep. No. 1488, 76th Cong., 3d Sess. (1940)	13, 14
H.R. Rep. No. 1896, 69th Cong., 2d Sess. (1927)	8
H.R. Rep. No. 2269, 71st Cong., 3d Sess. (1931)	9, 10
H.R. Rep. No. 669, 76th Cong., 1st Sess. (1939) ..	12, 13, 14
MISCELLANEOUS:	
19 Op. Atty. Gen. 161, 169 (1888)	15
30 L.D. 258 (1900)	15
50 L.D. 591 (1926)	15
53 L.D. 107 (1930)	15
53 L.D. 133 (1930)	15
Annual Report of the Board of Indian Commis- sioners (1887)	17
Annual Report of the Board of Indian Commis- sioners (1902)	18
Annual Report of the Board of Indian Commis- sioners (1906)	18
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1927) ..	17
Brief for Petitioner, <i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	27
Brief for the United States, <i>Bailess v. Paukune</i> , 344 U.S. 171 (1952)	26
Brief for the United States, <i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939)	25
Brief for the United States, <i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	26
Brief for the United States, <i>United States v. Mason</i> , 412 U.S. 391 (1973)	28
Brief for the United States, <i>United States v. McCurdy</i> , 246 U.S. 263 (1918)	24
Brief for the United States, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	29
Brief for the United States, <i>Nice v. United States</i> , 241 U.S. 591 (1916)	23

TABLE OF AUTHORITIES—Continued

	Page
Brief for the United States, <i>United States v. Rickert</i> , 188 U.S. 432 (1903)	22
Hoxie, <i>Beyond Savagery, The Campaign to Assimilate the American Indians, 1880-1920</i>	21
Leupp, <i>The Indian and His Problem</i> (1910)	19
McLaughlin, <i>My Friend the Indian</i> (1910)	19
Memorandum of Associate Solicitor (1989)	16
Memorandum for the United States, <i>Yakima Nation v. Yakima County</i> , 903 F.2d 1207 (9th Cir. 1990)	2
Otis, <i>The Dawes Act and the Allotment of Indian Lands</i> (Prucha edition, 1973) (originally entitled <i>History of the Allotment Policy</i>)	21
Pfaller, James McLaughlin, <i>The Man With the Indian Heart</i> (1978)	19
Proceedings of the Board of Indian Commissioners at 11th Lake Mohonk Indian Conference as reported in Annual Report of Board of Indian Commissioners (1893)	18
Proceedings of the Board of Indian Commissioners at 5th Lake Mohonk Indian Conference as reported in Annual Report of Board of Indian Commissioners (1895)	19
Prucha, <i>The Great Father</i> (1984)	22
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 2d Sess. (1906)	17
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2d Sess. (1891)	17
Schmeckebier, <i>The Office of Indian Affairs, Its History, Activities and Organization</i> (1927)	6, 7, 20
<i>S.D. State Historical Soc'y Quarterly</i> , Vol. 1	22
<i>The Problem of Indian Administration</i> (1928)	20
Transcript of Oral Argument, <i>United States v. Mason</i> , 412 U.S. 391 (1978)	28
Transcript of Oral Argument, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	29

INTEREST OF AMICI CURIAE

The concern that prompts the filing of this Brief can be simply stated. The tax records in county court houses are being rifled. Since 1987 tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands. Almost without exception, the tribal arguments are loosely premised on bits and scraps of language from several unrelated opinions of this Court in the 1970s. As a result, members of tribes have refused to pay their taxes (everywhere), tax abatement petitions have been filed (La Plata County, Colorado), individual lawsuits have been filed against counties in State courts (Corson County, South Dakota), tribal lawsuits have been filed against counties in federal courts (two in Montana), and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States (Todd County, South Dakota). (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

The Counties joining in this Brief all contain areas that at one time were established as Indian Reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered throughout the counties, some of which are owned by Indians and Indian Tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. As *Amici* States note, the precise

amount of lands nationally has not been determined. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in Todd County, South Dakota, approximately 60 percent of the entire county is held in trust by the United States for the Rosebud Sioux Tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 10 percent of the seven hundred and fifty thousand (\$750,000) to eight hundred and fifty thousand (\$850,000) dollars of total taxes collected by the county per year in recent years. In Dewey County, South Dakota, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not on a case by case basis as the court of appeals has indicated. The issue in this case represents a fundamental and most basic concept in Federal Indian Law that has been resolved and relied on for decades. For this reason, *Amici* respectfully submit that this Court authoritatively document and set forth that concept in this case.

Although the United States did not participate below except as *Amicus* in support of the tribal petition for rehearing and suggestion for rehearing *en banc*, at that time the United States told the court of appeals that to tax Indian fee lands would “create an exception *without* any policy basis, from the general rule that the state may not tax Indians or their property on reservations.” Mem-

orandum for the United States at 2. By Order of January 7, 1991, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. The United States responded by *now* asserting in this Court that various Acts of Congress and judicial decisions “*changed*” the effect “that Section 6 (including its provision) otherwise would have”. Brief for the United States at 15-16, n.10 (emphasis added). This is a significant concession. What the United States still did not tell this Court *Amici* would submit, is even more significant. Time and time again for almost three decades since the alleged change occurred, the United States has told everyone else, including this Court, a different story.

-SUMMARY OF ARGUMENT

Petitioners and *Amici Curiae* States have set forth in detail the reasons the court of appeals misconstrued *Brendale*, and while we agree with those important points, they are not repeated here.

The argument of *Amici Curiae* Counties centers around the fundamental validity of the taxes in question and the support for that position in the legislative history of the General Allotment Act and in the manner in which the United States and this Court have consistently construed this most important legislation.

ARGUMENT

I. The General Allotment Act Clearly Authorized the Taxation of Fee Patent Land.

Perhaps no other area of Federal Indian Law has been better understood than the taxing of Indian fee lands authorized by Congress in the General Allotment Act of 1887 (24 Stat. 388). In the beginning, even the general public was involved in the debate on the fundamental aspects of the question presented. Meetings were held, memorials passed, and Congress was inundated with the pros and cons of the allotment policy. When first introduced in 1881, the Senate debated the overall issue day after day. In subsequent years, the debate continued,

bills passed the Senate, were stalled in the House, and in 1887 the measure finally passed. Some of this legislative history was recently submitted to this Court by the United States in *United States v. Mitchell*, 445 U.S. 535 (1980). A more complete index is set forth in *Amici* App. 1a-2a. The General Allotment Act documents cited there are replete with evidence that Congress clearly intended, after the expiration of the twenty-five year trust, that Indian fee lands would be taxed as all other fee lands. For example, in 1881, the first provision that incorporated this concept stated:

That the lands acquired by any Indian under and by virtue of this act shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable, and not subject to taxation, lien, or incumbrance, for the period of twenty-five years from the date of the patent, which said restrictions shall be incorporated in the patents when issued. 11 Cong. Rec. 875 (1881). *Amici* App. 3a.

When Senator Dawes introduced the language of the present section in related legislation, he stated "The Indian, therefore, under the law will be to all intents and purposes the occupant of the land and enjoy all its uses and at the end of the twenty-five years the United States will be obliged by the force of this provision to give him or his heirs a patent discharged of the trust and free of incumbrance. It will be impossible to raise the question of taxation under that provision . . . 13 Cong. Rec. 3211 (1882). *Amici* App. 5a-6a.

It was clear, as Senator Coke stated in similar debate, that "Section 5 prohibits the alienation of land by the Indians; it exempts the land from taxation, from lien or incumbrance *for twenty-five years*." 11 Cong. Rec. 876-877 (1881) (emphasis added). And thereafter, the record is replete with similar statements, "Mr. Dawes. . . . The bill protects the property of the Indians for twenty-

five years. *That is the limit*. That is the intent of the bill." 15 Cong. Rec. 2242 (1884) (emphasis added). Other representative statements to this same effect are set forth in *Amici* App. 3a-10a.

When Congress amended this provision for unrelated reasons in the Burke Act in 1906 (34 Stat. 182), this understanding was reflected in the text of the Act, as Petitioner and *Amici* States have discussed at length. It is also reflected in the legislative history set forth verbatim in *Amici* App. 16a-56a and in the related documentation in *Amici* App. 57a-179a.

As one would expect, in other instances, whenever the subject was addressed in congressional debate or in House or Senate Reports, the explanation was always the same—both before and after the Burke Act of 1906. For example, when Congressman Burke addressed the House of Representatives in 1904, he referred to the twenty-five year trust exemption twice in the same debate:

The man who goes into that section of the country goes in there with a handicap of one-fifth of the land *nontaxable for twenty-five years*, and he has got to pay his proportionate increase of the expenses of that community for all that time. . . . The Indians will have the benefit of the roads, of the courts, and the benefits of a county and State government without contributing a cent therefor, their lands being *nontaxable for twenty-five years*, as before stated, while the settler who takes a homestead and acquires title to the same must do his share in paying these expenses. . . .

38 Cong. Rec. 2830 (1904) (emphasis added).

And in 1910, when Senator Gamble submitted a Report for the Committee on Indian Affairs, the Report similarly reflected this understanding:

Considering the fact that the Indian allotments are *relieved from taxation for a period of twenty-five years* and the Indians are to receive like advantages with the whites in connection with the above, it is thought by your committee that such a provision is

wise, equitable, and just not only to the Indians but to the prospective settlers. . . .

S. Rep. No. 68, 61st Cong., 2d Sess. at 4 (1910) (emphasis added).

Although Congress continued to amend the General Allotment Act over the course of the next two decades, none of the subsequent Amendments or supporting congressional documentation specifically focused on the fact that the tax exemption was tied to the twenty-five year trust period. It was presumed that this was naturally the case and there was no perceived need to ever clarify or direct any remarks to this point in any of these materials. However, the adoption of a more liberal policy for the issuance of fee patents in 1917 did eventually prompt Congress to indirectly address this commonly held presumption and in so doing, thereby lay to rest any argument or doubt that Congress could have ever intended or understood the exemption in any other way.

In 1917, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, adopted the more liberal policy of issuing patents in fee sooner to all Indians of less than half blood and issuing others on a less restrictive basis to those of larger percentage of Indian blood without individual applications. "Competency commissions" were dispatched to several reservations to accomplish this objective. This new declaration of policy provided in part that:

The time has come for discounting guardianship of all competent Indians and giving even closer attention to the incompetent that they may more speedily achieve competency. Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given full control of his property. . . .

L. Schmeckebier, *The Office of Indian Affairs, Its History, Activities and Organization*, at 152-153 (1927).

With this concerted policy as guidance, the consequences were predictably arbitrary, far reaching, and understandably subject to quick criticism and remedial action not at issue here. However, to the extent that premature taxation was stated as one necessary result of the process, the documentation surrounding the "forced fee" policy merits attention. With this limited purpose in mind, the documents are probative and unequivocal.

For example, by 1921 it was apparent to the Commissioner of Indian Affairs that apart from those "influences which sought to hasten the *taxable* status of the property" by "the termination of the trust title" and the issuance of "patents in fee", the degree of blood should not be a deciding factor to establish competency and applications should still be required:

[A]s there are numerous instances of full-bloods who are clearly demonstrating their industrial ability by the actual use made of their land and who are shrewdly content with a *restrictive title thereto that exempts them from taxation*. . . .

L. Schmeckebier, *supra* at 156-157 (emphasis added).

Congressional attention first focused on the issue when Congressman Williamson from South Dakota was informed that the Department of the Interior could not take "corrective" action on a forced fee patent without express congressional direction. As a result, on January 18, 1926, the Secretary of the Interior, Dr. Hubert Work, forwarded a draft of a department bill to the Committee on Indian Affairs. As justification for the measure, Secretary Work explained:

During the year 1919, and later, the then Secretary caused a great number of patents in fee simple to be issued to adult allottees, or to their heirs of less than one-half Indian blood, without application by the Indians for such patents, believing that such mixed-blood adult Indians were competent and capable of managing their own affairs. . . . This department canceled patents issued to two Coeur d' Alene Indians who had refused to accept their patents or

to pay taxes, and suit was brought to cancel the assessments. The United States Circuit Court of Appeals, Ninth Circuit, in these two cases, *United States v. County of Benewah* and *United States v. County of Kootenai, Idaho* (290 Fed. 628), held that the Secretary of the Interior had no authority under the act of May 8, 1906, to issue a patent in fee to an Indian allottee during the trust period without an application therefor; that a patent so issued did not pass title and such patents having been refused, the cancellation of the patent was upheld. . . . [T]he department desires legislative authority to cancel such patents where there has been no voluntary sale or encumbrance of the land.

S. Rep. No. 536, 69th Cong., 1st Sess. at 2-3 (1926) (emphasis added), *Amici App.* 63a.

For the purpose of the issue here, Secretary Work shared the commonly held presumptions noted above:

[P]atents, *prima facie*, subject the lands to taxation and other liens. . . . [I]ndians who had refused to accept their patents or to pay taxes. . . . Few of the Indians will or can pay taxes. . . . Practically all these lands have been placed on the tax rolls and some have been sold for nonpayment of assessments.

S. Rep. No. 536, 69th Cong., 1st Sess. at 2 (1926) (emphasis added), *Amici App.* 63a.

The bill was introduced on January 23, 1926. 67 Cong. Rec. 2630 (1926). In the House Report patents in fee are again equated with taxation:

Under existing law it has been held by the courts that the Indians have a vested right in the *tax-free status* of their allotments during the trust period fixed by law. . . . [T]hey did not want their patents in fee on the ground that they would be unable to pay the taxes. . . . [F]oreclosure or tax deed or disposed of them by sale. . . . [A]cceptance of the fee patent and a waiver of the *tax-exempt privileges of a trust patent*. . . .

H.R. Rep. No. 1896, 69th Cong., 2d Sess. at 1-2 (1927) (emphasis added). *Amici App.* 67a. It passed the House

without debate and was reported in the Senate on April 2, 1926. 67 Cong. Rec. 6763 (1926). Shortly thereafter, on April 10, 1926, 67 Cong. Rec. 7272 (1926), the measure passed the Senate and was signed by the President on February 26, 1927. 68 Cong. Rec. 4892 (1927). Act of February 26, 1927 (44 Stat. 1247).

In 1930, in response to bill that would have created a commission to investigate the entire matter, the Department of the Interior proposed a letter of instructions to all superintendents to gather the information needed and then report back to Congress. H.R. Rep. No. 2269, 71st Cong., 3rd Sess., at 3-5 (1931). Once again, taxation of patents in fee was a stated premise in the list of the questions contained in the instructions:

Has any of the land been sold for debt or taxes? . . .

If canceled, have tax assessments or tax sales been canceled or paid assessments refunded? . . .

H.R. Rep. No. 2269, 71st Cong., 3rd Sess. at 4 (1931). *Amici App.* 83a.

After the materials from the instructions were compiled, the new Secretary of the Interior, Ray Lyman Wilbur, reported back to Congress and proposed a bill to amend the 1927 Act and address the unanswered concerns: namely, that the Department be authorized to cancel certain fee patents and return the land to trust status if any portion of the allotment was not encumbered.

In his letter of transmittal dated December 18, 1930, Secretary Wilbur shared the same assumptions regarding fee patents and taxation related by his predecessor, Secretary Work. H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 3-5 (1931), *Amici App.* 83a.

Congressman Williamson reported the bill as amended in the House of Representatives on January 14, 1931. 74 Cong. Rec. 2193 (1931). This time even the text of the bill expressly reflects the concept of the *taxation of fee patents*.

Provided, That this act shall not apply where any such lands have been sold for *unpaid taxes* assessed after the date

H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 1-2 (1931) (emphasis added), *Amici App.* 83a.

The balance of the Report confirms the same understanding in every conceivable manner:

[I]t has been held by the courts that the Indians have a vested right in the *tax-free status* of their allotments *during the trust period* fixed by law. . . . [T]hey did not want their *patents in fee* on the ground that they would be unable to pay the *taxes*. . . . [N]ot pay the rapidly accruing *taxes*. . . . [L]ands through foreclosure or tax deed or disposed of them by sale. . . . Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the *tax-exempt privileges of a trust patent*. . . . *Taxes*, or even *tax deeds* can not be said to be encumbrances of a character to prevent cancellation. . . . [A]s to the States examined provision is made for reimbursement to tax-certificate holders, with interest, in all cases where taxes have been canceled. . . . All purchasers at tax sale are put upon notice as to any defect in making the tax levy and are not innocent holders for value. . . . [C]ases where the lands may have been sold for unpaid taxes assessed after the date of the encumbrance.

H.R. Rep. No. 2269, 71st Cong., 3d Sess. at 2-3 (1931) (emphasis added), *Amici App.* 83a.

On January 28, 1931, Congressman Williamson was requested to explain the bill on the floor of the House of Representatives because he had made a "special study" of the matter:

Mr. Williamson: It will mean this: There are still a few hundred tracts of land for which patents in fee have been issued without the consent of the holders of the trust patents, and if this bill is passed it will enable the Secretary of the Interior, upon the application of these Indians, to cancel the patents in fee to such of their lands as are unencumbered. This will have the effect of restoring their *trust-patent status*. In other words, this will mean that the lands

will *no longer be subject to taxation* or any other kind of encumbrance, and the Indian will then be able to hold the lands without paying taxes *until* the 25-year period of the trust patent has either expired or the extension has expired. . . . The point is these forced fee simple patents were illegally issued. The courts have so held, and the Indians have the undoubted right to have the lands involved restored as trust property. The courts have also held that the Indian has a vested right to the tax free status of his land; that this is a right he is entitled to insist upon. . . .

Mr. Williamson. *These trust patents carried a clause*, which is a part of the law authorizing the trust patent, providing that they shall remain in force for a period of 25 years from the time they were issued. So if these patents are restored they would become effective from the date of the trust patent that was superceded by a patent in fee; in other words, restores them to the status they had before the fee patent was issued. In some cases the 25-year period has been extended either by law or by Executive order. . . . [B]een filed by an Indian whose land has been restored to a trust patent status, the boards have restored the taxes to the Indian. . . . [M]y understanding is, from the information we now have, that there are only between 300 and 400 such tracts of land in the United States. . . . [T]hey found their lands had been *patented* and assessed and that taxes had accumulated. . . . [T]o meet the tax levies and to prevent their lands from being sold for *taxes*. . .

74 Cong. Rec. 3412-3413 (1931) (emphasis added), *Amici App.* 74a-78a. At the conclusion of his remarks the bill passed the House without further discussion. 74 Cong. Rec. 3413 (1931). The Senate adopted the entire House Report, noting that the facts were fully set forth therein and, after a short explanation and reference to the Report, passed the bill without further amendment on February 17, 1931. 74 Cong. Rec. 5195 (1931).

On at least one more occasion Congress revisited the issue in detail. Neither the 1927 Act nor the 1931 Act

provided for reimbursement of the taxes levied on the fee patented lands during the trust periods in question. In 1937, a bill was introduced to determine the status of each patent but it was rejected because the cost was estimated to exceed the amount involved. The next year, a measure that would have provided relief in one state was objected to for that reason. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 2 (1939), *Amici App.* 103a. Finally, on January 3, 1939, a comprehensive bill was introduced. 84 Cong. Rec. 34 (1939).

In the most explicit materials to date, the exemption granted by the 1887 General Allotment Act trust patent was repeatedly tied to the trust period. The Secretary of the Interior, Harold L. Ickes was first to suggest the comprehensive approach. In a letter to the Chairman of the House Committee on Claims, the Secretary stated:

Patents in fee having been recorded covering lands allotted to Indians the county authorities *naturally* felt they were entitled to assess and collect taxes thereon. Doubtless when requests were made for reimbursement of such taxes after the patents in fee were canceled and trust patents reinstated or re-issued, the counties either did not have funds in their treasuries available for such payment or the county officials lacked legal authority to pay. *Clearly* the local authorities were not at fault for *taxing* such land *while patents in fee were outstanding*. . . . Upon cancellation of patents in fee, county officials have been requested to remove the allotment from the tax-assessment rolls, cancel any unpaid assessments, tax sales or tax deeds, and refund any taxes paid. . . . [N]ot subject to taxation by State authorities during the years the invalid patents. . . . [R]ight to exemption from taxation was vested. . . . [L]ands had not been sold for unpaid taxes assessed. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 7-8 (1939) (emphasis added), *Amici App.* 103a.

He also suggested that the title be changed so as to read:

A bill for the relief of Indians who have paid *taxes* on allotted lands for which *patents in fee* were issued without application by or consent of the allottees and subsequently canceled, and for other purposes.

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 8 (1939) (emphasis added), *Amici App.* 103a.

Later, in response to a request from the Chairman of the House Committee on Indian Affairs for an Interior report on an identical bill, the acting Secretary of the Interior, E. K. Burlew, replied in nearly identical terms. S. Rep. No. 1488, 76th Cong., 3d Sess. at 5-6 (1940), *Amici App.* 122a. One month before the bill was reported in the House of Representatives, Secretary Ickes responded directly to the Chairman of the House Committee on Indian Affairs:

Clearly the local authorities were *not at fault* for *taxing* these lands while such *fee patents* were *outstanding*. . . . *Taxes* were levied by the various counties against the lands of the Indians thus receiving these "forced" *fee patents*. . . .

S. Rep. No. 1488, 76th Cong., 3d Sess. at 3 (1940) (emphasis added). All three reports were then appended to the House Report from the Committee on Indian Affairs. S. Rep. No. 1488, 76th Cong., 3d Sess. at 2-8 (1940), *Amici App.* 122a.

The Committee Report itself contains a brief history of the legislation and reflects the understanding clearly set forth in the correspondence from the Department of the Interior:

The levy and collection of taxes was a duty imposed upon local units of government by statutory law and the bonds of their officials. This was *not* their error. The error was by the United States Government. . . . *Lands so patented naturally* were *taxed* until the trust status was restored. . . . [T]he taxes *logically* levied. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 1 (1939) (emphasis added), *Amici App.* 103a. The Report further noted that the Secretary concluded that an appro-

priation of seventy-five thousand dollars (\$75,000.00) would be sufficient to take care of all cases, present and future. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 2 (1939).

Two weeks before the Report, Attorney General Frank Murphy advised the chairman that this Court had just granted a petition for a Writ of Certiorari in *Board of Comm'rs of Jackson County, Kansas v. United States*, 100 F.2d 929 (1938), *modified*, 308 U.S. 343 (1939), to resolve the question of interest in the same kind of cases present in the bill under consideration. For this reason, the Attorney General recommended that no action be taken with respect to this legislation until the Supreme Court heard and decided the *Jackson County* case. H.R. Rep. No. 669, 76th Cong., 1st Sess. at 4 (1939). For purposes here, it is not without significance that the correspondence of Attorney General Murphy, which was also appended to the House Report, reflects the same understanding found throughout all of the Congressional materials noted above:

[R]eimburse Indian allottees and Indian heirs of allottees for all *taxes* paid on so much of their allotted lands as, having been *patented in fee* prior to the expiration of the period of trust. . . . [C]ompensate Indian allottees for taxes erroneously collected from them and to relieve the political subdivisions of States of the burden of making restitution in such cases. . . .

H.R. Rep. No. 669, 76th Cong., 1st Sess. at 4 (1939) (emphasis added), *Amici App.* 103a.

As a result of the recommendation of Attorney General Murphy, it was not until the following year, 1940, that the House considered the bill on the merits. 86 Cong. Rec. 1628 (1940). When presented, it passed without amendment or debate. 86 Cong. Rec. 3007 (1940). The Senate Committee on Indian Affairs deemed the matter so fully explained in the House Report that it simply adopted and appended the Report in its entirety. S. Rep. No. 1488, 76th Cong., 3d Sess. (1940). Shortly

thereafter, the full Senate passed the measure without amendments or debate. 86 Cong. Rec. 6988 (1940). Act of June 11, 1940 (5th Stat. 298).¹

II. The General Allotment Act Was Clearly Understood to Authorize the Taxation of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

I am also of opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the Yakima Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

The United States thus retained its hold on the lands allotted for a period of 25 years after the allotment and as much longer as the President in his discretion might determine, and the *clearly expressed* intent of Congress is that *so long as* the land remains in *that* status it is beyond the power of the State to tax the same for any purpose.

53 L.D. 107 (1930) (emphasis added).

¹ More recent litigation related to this issue was resolved in *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

[L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. (This Court briefly reviewed some of these same decisions in *Duro v. Reina*, 110 S.Ct. 2053 (1990). In contrast to the broad characterization of the Associate Solicitor, *Duro* particularly described the exemption noted there as extending to only "certain taxes on transactions of tribal members. . ." *Duro*, 110 S.Ct. at 2606.) On balance, the prior Interior opinions are entitled to more weight than the 1989 Memorandum. See, e.g., *Duro*, 110 S.Ct. at 2063. Other historical sources confirm this position.

The annual reports of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Board of Indian Commissioners, compiled and communicated to Congress each year, are replete with evidence of the historical understanding that this tax exemption was intended and understood to correspond with the trust period. Representative excerpts from these reports are set forth in more detail in *Amici App.* 123a-179a. From the beginning, the Secretary of the Interior quoted the Commissioner of Indian Affairs' conclusion in support of this position:

Even in the cases where, by taking their lands in severalty, they are in process of becoming citizens, they are still in a state of quasi-independence, because the General Government withholds from them for twenty-five years the power of alienating their lands, while by exempting them from taxation for the same period. . . .

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. at 38 (1891) (emphasis added), *Amici App.* 131a.

And the Commissioner of Indian Affairs expressed the same principle in more than one way:

Under a principle of law recognized by the courts, *real property held in trust by the Federal Government is not taxable by the State. . . .*

At the same time, with the exception that their lands received under allotment laws will be *exempt from taxation for a period of twenty-five years*, and possibly longer, they will be subject to the burdens borne by other citizens, and must manage their own affairs. . . . Annual Report of the Commissioner of Indian Affairs at 13, 56 (1927) (emphasis added), *Amici App.* 172a.

It also confers authority on the Secretary of the Interior, in his discretion, to *terminate the trust period by issuing a patent in fee simple* whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs. . . . Report of the Commissioner of Indian Affairs, H.R. Doc. No. 5, 59th Cong., 2nd Sess. at 49 (1906) (emphasis added), *Amici App.* 154a.

The Board of Indian Commissioners was authorized by statute in 1869 and organized by an Executive Order of President Grant that same year. In its annual reports to the Secretary of the Interior, the Board made detailed recommendations on the broad Indian policy questions of the day. Because one-half of the members of the 1887 Board continued to serve for the next two decades, it was an informed and influential institution. Year after year the annual reports confirm the essential principles set forth above. Any one of several examples make the point:

The lands allotted to the Indians are *exempt from taxation for a period of twenty-five years. . . .* Annual Report of the Board of Indian Commissioners at 8 (1887) (emphasis added), *Amici App.* 126a.

The reception of an allotment of land to which the title is by law protected from alienation or taxation for twenty-five years. . . . Annual Report of the Board of Indian Commissioners at 7 (1902) (emphasis added), *Amici App.* 149a.

We have understood that it was largely the wish on the part of the present Commissioner of Indian Affairs to protect allottee Indians against the evils which follow the sale and the use of intoxicants, which led him to advocate the amendment to the general severalty act known as the Burke law, by which Indians allotted after May 8, 1906, do not become citizens by virtue of allotment until after the expiration of *twenty-five years*, the period covered by the *protected title* to their lands—the *trust deed* from the United States which keeps Indian allotments inalienable and *untaxed* for that length of time. . . . Annual Report of the Board of Indian Commissioners at 7-8 (1906) (emphasis added), *Amici App.* 155a.

[T]he wise statesmanship of Senator Dawes and others who framed and carried into effect the Dawes Act of February, 1887, proposed to train Indians for citizenship by intrusting them at once, on allotment, with the duties and the conscious responsibilities of active, local citizenship, and with the manhood—stimulating right of suffrage, while the homestead was made inalienable and was *freed from taxation* by the United States *trust deed* for twenty-five years. . . . Annual Report of the Board of Indian Commissioners at 8 (1906) (emphasis added), *Amici App.* 155a.

In addition to the annual reports, guest speakers such as the Commissioners of Indian Affairs and Senator Dawes were invited each fall to address the Board at its Lake Mohonk Conference. The proceedings were transcribed and appended to the annual report, and constitute yet another source that reflects this same understanding. For example, in 1893 Senator Dawes referred to "[a]l-lotted Indians, *not* a foot of whose land can be *taxed* for *twenty-five years*" Proceedings of the Board of Indian Commissioners at 11th Lake Mohonk Indian Confer-

ence as reported in the Annual Report of the Board of Indian Commissioners at 61 (1893) (emphasis added). In 1895, Commissioner of Indian Affairs Browning similarly stated "[w]hen the lands are allotted to the Indians and they become citizens, under the law the lands are *not taxable for twenty-five years*" Proceedings of the Board of Indian Commissioners at 5th Lake Mohonk Indian conference as reported in the Annual Report of the Board of Indian Commissioners at 37 (1895) (emphasis added). Early texts by other authorities support this same construction.

For example, F.E. Leupp, the Commissioner of Indian Affairs at the time of the 1906 Burke Act also viewed the restrictions on taxation as tied to the trust status of the land. In his 1910 text, Commissioner Leupp summarized the administration of the General Allotment Act from his perspective and discussed the taxation issue in the context of fee lands. Leupp, *The Indian And His Problem*, 34, 47, 64, 75 (1910). (Also, see *Amici App.* 46a, 50a, where the recommendations of Commissioner Leupp are contained in the House and Senate Reports on the Burke Act.)

James McLaughlin worked for fifty-two years, 1871-1923, in the Indian service. As an inspector in the Department of the Interior, he had more experience in dealing with the General Allotment Act than any other individual of his time. In 1910, he summarized this experience in the following words:

In the process of civilization, they had arrived at a stage of their progress when, as part of the usual policy, they were given their lands in severalty. To each individual was allotted one hundred and sixty acres of land, the title to which was to be held in trust by the government for twenty-five years and then patented in fee to the allottee. The allotted lands were to be free of taxes *during* the trust period.

McLaughlin, *My Friend the Indian*, 106 (1910) (emphasis added). See Pfaller, *James McLaughlin, The Man With the Indian Heart*, xi, 331-332 (1978).

Later, the Institute for Government Research published a series of authoritative monographs giving a detailed description of each of the more distinct services of the government. In 1927, Laurence F. Schmeckebier's *The Office of Indian Affairs, Its History, Activities and Organization*, the most extensive text on the subject to that date, reflects this same understanding. "[T]he several states are not allowed to tax Indian property held by the United States in trust [T]ribal and allotments held in trust are exempt from state and local taxation" Schmeckebier, *supra*, at 9, 11 (1927) (emphasis added).

A year later, the Institute responded to a special request of the Secretary of the Interior with the publication of *The Problem of Indian Administration*, commonly called the Meriam Report after its principal author. More will be said about this Report by others, but it is important to remember here that the explanation on taxation confirms again the opinions on this subject set forth above.

When an Indian is declared competent to manage his own property and is given a *fee deed* to it, his property becomes *subject to state and local taxation*. . . .

Under the allotment act the incompetent Indian holding a *trust patent* is generally *exempt from taxation*. On the day he is declared competent and is given his *fee patent*, he straightway becomes subject to the full burden of *state and local taxation*. . . . *The Problem of Indian Administration*, at 95, 477 (1928) (emphasis added).

Shortly thereafter, Dr. D.S. Otis was actually employed by the Bureau of Indian Affairs to write an entire book on the "History of the Allotment Policy". Through the efforts of the Commissioner of Indian Affairs, John Collier, Otis' monograph was inserted in its entirety in the hearing records of the Indian Reorganization Act of 1934 (Readjustments of Indian Affairs). Once again, in the most comprehensive and fact specific text to date, described by the editor of the 1973 edi-

tion, Francis Paul Prucha, as "a careful study of the carrying out of allotment in the years following the enactment of the law", the conclusion is the same:

The Dawes Act, providing for the twenty-five-year Federal trust period during which time the land might not be encumbered, meant, it was clear, that no State could tax the allottee's holdings. . . . Otis, *The Dawes Act and the Allotment of Indian Lands*, at 105 Prucha edition (1973) (originally entitled *History of the Allotment Policy*) (emphasis added).

Citations to other scholarly works that have continued to confirm this understanding up to the present time could fill a small book. One recent thesis, by the same author cited by this Court in *Solem v. Bartlett*, 465 U.S. 463, at 480, n.25 (1984), F. Hoxie, entitled *Beyond Savagery, The Campaign to Assimilate the American Indians, 1880-1920* states:

For the remainder of his term, federal funds were used only for "restricted" non-tax-paying Indians. Patented tribesmen—who presumably paid property taxes—were usually expected to attend the public schools. . . .

This was the doctrine of guardianship. As it evolved between 1890 and 1920, the concept of federal control over individual Indians was used to protect land titles, to continue *tax exemptions on trust land*. . . . The severalty law granted all allottees citizenship, but stipulated that their homesteads would be held under a *trust title* that prevented the sale of their land and *exempted them from taxation*. . . . F. Hoxie, *supra*, at 554, 566, 568 (emphasis added).

However, the most recent example undoubtedly is the 1991 article by a Bureau of Indian Affairs historian, from Washington, D.C. Michael L. Lawson. In this feature article, the author recounts:

[T]he General Allotment Act provided that title to these allotments would be held in trust by the United States for at least twenty-five years during which time the land could not be sold, leased, *taxed*, mortgaged, devised by will, or otherwise encumbered

without the consent of the federal government. It was hoped that by the end of this probationary period, the individual allottee, who would then be eligible to receive the usual *fee simple title* to the land, would have learned how to make productive use of the acreage, to know its market value, and to be ready to assume full responsibility for it, including the payment of the *taxes*. . . .

[I]f this was found not to be the case, the law gave the President discretionary power to extend the *trust period*. . . . *S.D. State History Soc'y Quarterly*, No. 1 at 4 (1991).²

III. The General Allotment Act Has Been Consistently Construed to Clearly Authorize the Taxation of Fee Patent Land.

Although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land". Brief for the United States at 15, 42, *Rickert, supra* (emphasis added). The *Rickert* opinion reflects this representation:

no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . While the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath*, 203 U.S. 146, (1906), a related issue was generally discussed and de-

² See Prucha, *The Great Father* (1984).

cisively resolved. The *Goudy* argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice*, 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of General Allotment Act and the status of the individual:

[C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship*. . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare. . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply. . . .

Brief of the United States at 26, 21, 12, *Nice, supra* (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert, supra*,

The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition", held that the State was *without power to tax* the [trust] lands and other property, because the same were being held and used in carrying out a policy of the Government. . . .

Nice, supra (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918).

Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land for a *limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race". . . .

Brief for the United States at 9, 11, 12, *McCurdy, supra*, (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain terms. At the same time, the Court clearly restated the basis of *Rickert, supra*:

There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L. Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

Brief for the United States at 266, *McCurdy, supra* (emphasis added). Nothing in *United States v. Nice, supra*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *United States v. McCurdy, supra*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States equated a General Allotment Act trust patent with the exemption from taxation:

The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887

[24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period*. *Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Brief for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas, supra* (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. . . .

In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent*. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its *regular property taxes*. It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted *in reliance on a fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law*, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the

intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

Board of Comm'rs, supra at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United States conceded that subsequent to that period, the land was legally taxable. Brief for the United States, at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).³

In 1952, the United States in *Bailess v. Paukune*, 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act".

[w]hether *under trust patents* or *under fee patents with restrictions* upon alienation. . . .

Brief for the United States at 2, *Bailess v. Paukune, supra* (emphasis added).

Bailess involved the taxation of land of an allegedly Indian widow, who in due course was to receive a "fee

³ Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen, supra*. Also, see *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987), and *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979).

patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune*, to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess v. Paukune, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, *supra*, the United States succinctly stated that:

this provision was undoubtedly intended to *make it clear* that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation. . . .

Brief for the Petitioner, note 4 at 13, *Squire v. Capoeman*, 351 U.S. 1, 13, n.4 (1956) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee*, but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In 1973, in *United States v. Mason*, 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

relied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment

Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . and provided for taxation after the termination of the trust.

Brief for the United States, at 9-10, 17, *Mason, supra* (emphasis added). The Court in *Mason* agreed:

Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' when Indian property is granted in fee. . . .

Mason, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and taxation are lifted. This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument, at 38, *United States v. Mason*, 412 U.S. 391 (1978) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

The General Allotment Act . . . for the limited purposes of (a) restraining improvident alienation of the

land by the allottees and (b) affording an immunity from state taxation for the period during which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell, supra* (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the meantime, the United States was simply to hold title in trust solely for the purpose of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument, at 14, *United States v. Mitchell*, 445 U.S. 535 (1980) (emphasis added). This Court agreed:

[W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land is made inalienable and non-taxable for a sufficient length of time.' . . ." *Mitchell*, 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring immunity from state taxation during the period of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments

the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

In addition, in many cases, this Court has addressed in detail the arguments, principles and rules of construction that govern this case. See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)⁴ and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). The Congressional documents set forth above more than satisfy the standards of clarity required here to sanction the taxation of Indian fee lands. It is too late in the day to give serious credence to an unsubstantiated argument that this understanding and established practice has been somehow repealed by implication—especially without anyone having even *mentioned* the fact until now.

CONCLUSION

The judgment of the Court of Appeals should be affirmed, except as to real estate excise taxes and the *Brendale* remand.

Respectfully submitted,

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⁴ Even so, in the special area of state taxation, *absent* cession of jurisdiction or other federal statutes *permitting it*, there has been no satisfactory authority for *taxing* Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n*, *supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible *absent congressional consent*.

Mescalero Apache Tribe, 411 U.S. at 148 (emphasis added).

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
Excerpts from the legislative history of the General Allotment Act, ch. 119, 24 Stat. 388 (1887)	1a
Excerpts from the legislative history of S. 2068, 52nd Cong., 1st Sess. (1892)	11a
The Burke Act, ch. 2348, 34 Stat. 182 (1906)	16a
Force Fee Patent Related Legislation	
Act of Feb. 26, 1927, ch. 215, 44 Stat. 1247	57a
Act of Feb. 21, 1931, ch. 271, 46 Stat. 1205	70a
Act of June 11, 1940, ch. 315, 54 Stat. 298	94a
Annual Reports of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Board of Indian Commissioners for the years 1887-1931	123a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 1st Sess. (1887)	123a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 1st Sess. (1887)	124a
Annual Report of the Board of Indian Commissioners (1887)	125a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 2nd Sess. (1888)	127a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 2nd Sess. (1888)	127a
Annual Report of the Board of Indian Commissioners (1888)	128a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. (1889)	128a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. (1889)	129a
Annual Report of the Board of Indian Commissioners (1889)	129a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 2nd Sess. (1890)	130a

TABLE OF CONTENTS—Continued

	Page
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 2nd Sess. (1890)	130a
Annual Report of the Board of Indian Commissioners (1890)	130a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 1st Sess. (1891)	130a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. 1, 52nd Cong., 1st Sess. (1891)	131a
Annual Report of the Board of Indian Commissioners (1891)	133a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. (1892)	134a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. (1892)	135a
Annual Report of the Board of Indian Commissioners (1892)	135a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 2nd Sess. (1893)	135a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 2nd Sess. (1893)	136a
Annual Report of the Board of Indian Commissioners (1893)	136a
Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 3rd Sess. (1894)	138a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 3rd Sess. (1894)	139a
Annual Report of the Board of Indian Commissioners (1894)	139a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 1st Sess. (1895)	139a

TABLE OF CONTENTS—Continued

	Page
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 1st Sess. (1895)	142a
Annual Report of the Board of Indian Commissioners (1895)	140a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 2nd Sess. (1896)	142a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 2nd Sess. (1896)	142a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 2nd Sess. (1897)	142a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 2nd Sess. (1897)	142a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 3rd Sess. (1898)	143a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 3rd Sess. (1898)	143a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 1st Sess. (1899)	143a
Annual Report of the Board of Indian Commissioners (1899)	143a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 2nd Sess. (1900)	145a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 2nd Sess. (1900)	146a
Annual Report of the Board of Indian Commissioners (1900)	146a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 57th Cong., 1st Sess. (1901)	147a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 57th Cong., 1st Sess. (1901)	147a

TABLE OF CONTENTS—Continued

	Page
Annual Report of the Board of Indian Commissioners (1901)	147a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 57th Cong., 2nd Sess. (1902)	148a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 57th Cong., 2nd Sess. (1902)	148a
Annual Report of the Board of Indian Commissioners (1902)	149a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 2nd Sess. (1903)	150a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 2nd Sess. (1903)	150a
Annual Report of the Board of Indian Commissioners (1903)	150a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 3rd Sess. (1904)	153a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 3rd Sess. (1904)	153a
Annual Report of the Board of Indian Commissioners (1904)	153a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 1st Sess. (1905)	154a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 1st Sess. (1905)	154a
Annual Report of the Board of Indian Commissioners (1905)	154a
Report of the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 2nd Sess. (1906)	154a
Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 2nd Sess. (1906)	155a

TABLE OF CONTENTS—Continued

	Page
Annual Report of the Board of Indian Commissioners (1906)	155a
Annual Report of the Secretary of the Interior Vol. 1 (1907)	156a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1907)	156a
Annual Report of the Secretary of the Interior Vol. 1 (1908)	156a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1908)	156a
Annual Report of the Board of Indian Commissioners (1908)	156a
Annual Report of the Secretary of the Interior Vol. 1 (1909)	157a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1909)	157a
Annual Report of the Board of Indian Commissioners (1909)	158a
Annual Report of the Secretary of the Interior Vol. 1 (1910)	158a
Annual Report of the Secretary of the Interior Vol. 1 (1911)	159a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1911)	160a
Annual Report of the Secretary of the Interior Vol. 1 (1912)	160a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1912)	161a
Annual Report of the Board of Indian Commissioners (1912)	161a
Annual Report of the Secretary of the Interior Vol. 1 (1913)	161a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1913)	162a

TABLE OF CONTENTS—Continued

	Page
Annual Report of the Secretary of the Interior Vol. 1 (1914)	162a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1914)	163a
Annual Report of the Board of Indian Commissioners (1914)	163a
Annual Report of the Secretary of the Interior Vol. 1 (1915)	163a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1915)	164a
Annual Report of the Secretary of the Interior Vol. 1 (1916)	164a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1916)	164a
Annual Report of the Secretary of the Interior Vol. 1 (1917)	164a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1917)	165a
Annual Report of the Secretary of the Interior Vol. 1 (1918)	166a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1918)	166a
Annual Report of the Secretary of the Interior Vol. 1 (1919)	166a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1919)	166a
Annual Report of the Secretary of the Interior Vol. 1 (1920)	167a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1920)	167a
Annual Report of the Secretary of the Interior Vol. 1 (1921)	167a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1921)	168a

TABLE OF CONTENTS—Continued

	Page
Annual Report of the Board of Indian Commissioners (1921)	169a
Annual Report of the Secretary of the Interior Vol. 1 (1922)	170a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1922)	170a
Annual Report of the Board of Indian Commissioners (1922)	170a
Annual Report of the Secretary of the Interior Vol. 1 (1923)	171a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1923)	171a
Annual Report of the Secretary of the Interior Vol. 1 (1924)	171a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1924)	171a
Annual Report of the Secretary of the Interior Vol. 1 (1925)	171a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1925)	171a
Annual Report of the Secretary of the Interior Vol. 1 (1926)	171a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1926)	172a
Annual Report of the Secretary of the Interior Vol. 1 (1927)	172a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1927)	172a
Annual Report of the Board of Indian Commissioners (1927)	173a
Annual Report of the Secretary of the Interior Vol. 1 (1928)	173a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1928)	174a

TABLE OF CONTENTS—Continued

	Page
Annual Report of the Secretary of the Interior Vol. 1 (1929)	174a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1929).....	174a
Annual Report of the Board of Indian Commissioners (1929)	175a
Annual Report of the Secretary of the Interior Vol. 1 (1930)	177a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1930)	178a
Annual Report of the Secretary of the Interior Vol. 1 (1931)	178a
Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1931)	178a

APPENDIX

INDEX TO LEGISLATIVE HISTORY OF THE
GENERAL ALLOTMENT ACT

The General Allotment Act or Dawes Act can be traced back to 1880 when similar bills were debated in the Senate beginning with S. 1773, 48th Cong., 2nd Sess. (1880). That bill was reported in the Senate at 10 Cong. Rec. 3507. Then in the 48th Cong., 3d Sess. (1881), S. 1773 was considered and amended. See 11 Cong. Rec. 761, 778-788, 873-882, 904-913, 933-943, 994-1003, 1026-1038, 1060-1070, 1211, 1096, and 1253.

In 1882, a similar bill, S. 1445, 47th Cong., 1st Sess. (1882), was introduced in the Senate as a replacement for Senate bills 19 and 931. See 13 Cong. Rec. 1824. That bill was amended and passed the Senate. See 13 Cong. Rec. 3212.

S. 48, 48th Cong., 1st Sess. (1883) was introduced next and referred to the Senate Committee on Indian Affairs. See 15 Cong. Rec. 13. It was reported back with amendments in 1884. See 15 Cong. Rec. 877. It was then debated, amended, and passed. See 15 Cong. Rec. 2240-2242, 2277-2280. In the 48th Cong. 2nd Sess. (1884), S. 48 was referred to the House Committee on Indian Affairs. See 16 Cong. Rec. 218. It was then reported back with accompanying House Report 2247 (H.R. 2247, 48th Cong., 2nd Sess. (1884) Serial Set #2328 Vol. 1). See 16 Cong. Rec. 580.

In 1885, S. 54, 48th Cong., 1st Sess. (1885) was introduced and referred to the Senate Committee on Indian Affairs. See 17 Cong. Rec. 123. It was reported back in 1886, see 17 Cong. Rec. 841, and was then debated, amended, and passed in the Senate. See 17 Cong. Rec. 1558, 1630-1635, 1674, 1719, 1762-1764. It was then referred to the House Committee on Indian Affairs, see 17 Cong. Rec. 1959, and reported back with House Report

1835. (H.R. 1835, 48th Cong., 1st Sess. Serial Set #2240 Vol. 8). See 17 Cong. Rec. 3841.

S. 54 was then debated in the 49th Cong., 2nd Sess. as well. See 18 Cong. Rec. 189, 224-225. It was amended and passed the House, see 18 Cong. Rec. 226, and then referred to the Senate Committee on Indian Affairs. See 18 Cong. Rec. 247, 313. The bill was then returned to the House. See 18 Cong. Rec. 273, 285, 315. The Senate non-concurred in the House amendments, see 18 Cong. Rec. 476, and a conference was then appointed. See 18 Cong. Rec. 478, 534, 580. A conference report was made, debated, and agreed to. See 18 Cong. Rec. 772, 882, 972. The bill was then examined and signed, see 18 Cong. Rec. 1048, 1054, and approved by the President. See 18 Cong. Rec. 1577 (1887).

In 1906, the Burke Act was signed, amending section 6 of the Dawes Act of 1887. The Burke Act began as House Resolution 11946, 58th Cong., 1st Sess., and was first referred to the House Committee on Indian Affairs. See 40 Cong. Rec. 1110. It was reported back with amendments, accompanied by House Report 1556, (H.R. 1558, 59th Cong., 1st Sess. Serial Set #4941 vol. 1). See 40 Cong. Rec. 2812. The bill was then debated, amended, and passed in the House. See 40 Cong. Rec. 3598, 3602. It was then referred to the Senate Committee on Indian Affairs, see 40 Cong. Rec. 3638, and was reported back with amendments and Senate Report 1998. (S.R. 1998, 59th Cong., 1st Sess. Serial Set #4904 vol. 1). See 40 Cong. Rec. 4153. The bill was passed over, see 40 Cong. Rec. 5189, 5605, and was then debated, amended, and passed in the Senate. See 40 Cong. Rec. 4805. The House concurred in the Senate amendments. See 40 Cong. Rec. 5980. It was examined and signed, see 40 Cong. Rec. 6089, 6100, 6233, and was approved by the President. See 40 Cong. Rec. 7795.

EXCERPTS FROM THE LEGISLATIVE HISTORY OF THE GENERAL ALLOTMENT ACT OF 1887

Mr. COKE. In section 5 of this bill it is provided:

That the lands acquired by any Indian under and by virtue of this act shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance or by the judgment, order or decree of any court, or subject to taxation of any character, but shall be and remain inalienable, and not subject to taxation, lien, or incumbrance, for the period of twenty-five years from the date of the patent, which said restrictions shall be incorporated in the patents when issued.

If the Senator's amendment prevails, will not that provision be rendered nugatory?

Mr. HOAR. I do not understand it so. . . .

11 Cong. Rec. 875 (1881).

Mr. COKE. . . . Section 5 prohibits the alienation of land by the Indians; it exempts the land from taxation, from lien or incumbrance for twenty-five years. . . .

11 Cong. Rec. 876-877 (1881).

Mr. COKE. . . . In the first place, his lands are exempt from judgment and from execution, are exempt from taxation, which those of no citizen are. . . .

11 Cong. Rec. 877 (1881)

Mr. COKE. . . . There is an exemption here from taxation. There is a prohibition against alienation. One is a privilege and the other a burden. They are put there for the benefit and protection of the Indian. . . .

11 Cong. Rec. 878 (1881)

Mr. BROWN. . . . It is true you exempt his land from taxes by this bill for a certain length of time. . . .

11 Cong. Rec. 880 (1881).

Mr. BROWN. . . . I trust, Mr. President, that we shall pass this bill in a shape that will give every Indian a home on his reservation, and guarantee it to him and his children for all time to come, and that the power of alienation will be restricted until he has learned the rights and the duties of an American citizen. After that let him and his posterity take care of it or alienate it as may any one else. Fix a reasonable time; exempt their homesteads from taxation. After that time there is no further exclusion in the fourteenth constitutional amendment in the way of counting them in the representative population of the States where they may reside, and no reason that I can see why they may not be full-fledged citizens and voters.

11 Cong. Rec. 882 (1881).

Mr. CALL. . . . But the bill cautiously and carefully proceeds with a preliminary period, a probationary period of twenty-five years, which shall be a period of preparation for them before their ownership of land shall be complete. . . .

11 Cong. Rec. 908 (1881).

Mr. PLUMB. . . . If that position of the bill which provides that these lands shall not be alienated and shall not be subject to taxation for a period of twenty-five years and shall not be leased until the same period shall pass, you will find about your doors here from year to year an increasingly tumult from the communities in which you have set these people, exempt from the burdens of the Government and occupying lands which they cannot cultivate—a tumult which you cannot prevent and the consequences of which you cannot avoid.

11 Cong. Rec. 942 (1881).

Mr. TELLER. . . . It is provided in the sixth line of the sixth section "that their lands shall not be subject to taxation or execution upon the judgment, order, or decree

of any court." That ought to be qualified so that they shall not be subject to taxation, judgment, &c., for a period of twenty-five years, because that will make it in harmony with the rest of the bill. . . .

11 Cong. Rec. 997 (1881).

Mr. DAWES. The matter which is involved in the lines on the third page, beginning with the proviso in the fifty-fourth line of section 1, has been discussed several times in the Senate; and to obviate all question about it, to reach precisely what is sought for in that proviso and at the same time avoid any question about the right of the State to tax this land so held by an Indian in severalty, I have prepared a substitute for the proviso, which I have shown to several members—not all, for I have not had time—of the Committee on Indian Affairs, and which I think will commend itself to the Senate. Therefore I move to strike out that proviso and insert what I send to the desk.

The ACTING SECRETARY. It is proposed to strike out, after the word "act," in line 54 of section 1, the following proviso:

Provided, That the title to lands acquired by Indians under the provisions of this act shall not be subject to alienation or incumbrance, either by voluntary conveyance or by the judgment, decree, or this order of any court, but shall be and remain inalienable and not subject to taxation, lien, or incumbrance for any purpose for a period of ten years from the date of patent, and until such time thereafter as the President may see fit to remove the restriction, which conditions shall be expressed in the patent.

And in lieu thereof to insert:

Which shall be of the legal effect, and declare that the United States does and will hold this land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment

shall have been made; or, in case of his decease, of his heirs, according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharge of said trust and free of all charge or incumbrance whatsoever.

Mr. DAWES. That, in short, Mr. President, provides that the United States shall hold the title itself to this particular severalty, but in trust for the sale use and benefit of each Indian getting his land in severalty. The Indian, therefore, under the law will be to all intents and purposes the occupant of the land and enjoy all its use, and at the end of twenty-five years the United States will be obliged by the force of this provision to give him or his heirs a patent discharged of the trust and free of incumbrance. It will be impossible to raise the question of taxation under that provision, and that will secure to the Indian his rights in severalty precisely as the other provision would.

The amendment was agreed to.

13 Cong. Rec. 3211 (1882). (Umatilla Allotment Act.)

Mr. DAWES. I offer the same amendment which I offered to the bill that has just passed, to strike out the proviso on the fifth page, beginning at the third line of the fifth section, down to and including the eleventh line, and insert:

Which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs aforesaid in fee discharged of said trust and free of all charge or incumbrance whatsoever.

Mr. COKE. While I do not see the necessity of that amendment, I cannot perceive that it will do any harm, and am willing as far as I am concerned, to accept it.

13 Cong. Rec. 3212 (1882).

Mr. CONGER. Before the bill goes over I wish to call the attention of the committee to one point to be considered before to-morrow morning. There is nothing said in the bill in regard to the taxation of this property. This alienable property of the Indians is distributed in all States and Territories where the lands lie, and there is an uncertainty in regard to the right of the State or Territory to tax the property. I think some provisions of that kind is worthy of the consideration of the committee.

Mr. DAWES. The bill protects the property of the Indians for twenty-five years. That is the limit. That is the intent of the bill.

Mr. CONGER. It does not say so in terms.

Mr. DAWES. It says so in absolute legal effect, because the United States is to hold the title. The title in fee remains in the United States for twenty-five years.

Mr. CONGER. But it is not to be inalienable for twenty-five years. I merely call attention to it. It seems to me there should be some provision by which this property could all be saved to the Indians and saved to them from any attempt at taxation.

15 Cong. Rec. 2242 (1884).

Mr. DOLPH. . . . We propose now to allot lands to them in severalty, and to make such lands inalienable for twenty-five years, and it is supposed that at the end of twenty-five years they will become capable of taking care of themselves. . . .

15 Cong. Rec. 2277 (1884).

Mr. COKE. . . . After providing that the patent shall be issued and shall convey the land in fee discharged of trusts at the end of twenty-five years, it reads:

Provided, That the President may withhold the issuance of the patent in fee in any case for such further time as he may deem to be for the interests of the Indians. And the trust created in the original patent shall be and remain in full force until the patent in fee be issued.

If the condition of affairs exists at the expiration of twenty-five years feared by the Senator from California, here is ample discretion reserved to the President of the United States to apply the proper remedy, and that is to withhold the patents. I think that is an abundant answer to the objection the Senator has made.

15 Cong. Rec. 2278-2279 (1884).

Mr. DAWES. . . . But as to the individual allotments the term is fixed at twenty-five years. It is fixed for several reasons. One is that the holding of land by the United States so that it can not be taxed in any community, for any unnecessary period of time, is irksome and unwise, unless there be some good reason for it. The allotment patent which is to issue after twenty-five years is only to issue to such Indians as in the opinion of the Interior Department are so far advanced in the outset as to give hope and encouragement that by this process they will be self-supporting at the end of twenty-five years from that time and be able to stand upon their own feet. I know the Senator would desire that the moment an Indian, like any white man, is able to take care of himself he should be free to dispose of his property like any white man. . . .

Mr. COKE. . . . The President must find these facts recited in this section of the bill to be true before he can put the machinery of this bill in motion. Then he must get the consent of two-thirds of each tribe before it operates upon that tribe. Then when the lands are surveyed patents are issued promising a fee-simple title to the Indians at the end of twenty-five years. At the expiration of that time, if there are any conditions surrounding the Indians which make it in the judgment of

the President improper that they should have the fee-simple title to the land, the President is authorized to withhold patents for an indefinite time. . . .

15 Cong. Rec. 2279 (1884).

Mr. DAWES. . . . Under a subsequent part of the bill the United States is to give him a patent, by which the United States covenants to hold for him for twenty-five years in trust this particular 160 acres, and at the end of twenty-five years to give him or his heirs a patent in fee.

17 Cong. Rec. 1630 (1886).

Mr. SKINNER. . . . Or shall he be converted into a civilized tax-payer, contributing toward the support of the Government and adding to the material prosperity of the country? . . . In addition thereto, his land is made inalienable and non-taxable for a sufficient length of time for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man. . . .

17 Cong. Rec. 190 (1886).

Mr. PERKINS. . . . It has the warm endorsement and approval of the Secretary of the Interior, of the Commissioner of Indian Affairs, and of all those who have given attention to the subject of the education, the Christianization, and the development of the Indian race. . . . The bill provides for the breaking up, as rapidly as possible, of all the tribal organizations and for the allotment of lands to the Indians in severalty, in order that they may possess them individually and proceed to qualify themselves for the duties and responsibilities of citizenship. . . .

For that reason, as I have suggested, it meets the warm approval of all the Government officers whose duties bring them in close contract with the Indians, and it has also the indorsement of the Indian rights association throughout the country, and of the best sentiment of the land. . . .

18 Cong. Rec. 191 (1887).

Mr. DOLPH. . . . Do I understand that the changes made by the House amendments and the conference committee permit a lien or disposition of lands that shall be allotted to Indians in severalty after the lapse of a less period than that provided in the bill as passed by the Senate—twenty-five years? Also, do I understand that the provision inserted in the bill in the Senate—

Mr. DAWES. Will the Senator put his first interrogatory again?

Mr. DOLPH. My question is whether such changes have been made in the bill that instead of the bill as it passed the Senate providing that the land which shall be allotted to Indians in severalty can only be disposed of or be subject to liens after a period of twenty-five years, it now allows that to be done after five years?

Mr. DAWES. No, that has not been changed, except in this way, that the President may, in his discretion in any particular case, extend the time after the twenty-five years. The time limiting the power of alienation is not reduced at all, but has this further extension in the discretion of the President as to any particular case.

Mr. DOLPH. According to the conference report, when are patents to issue to the individual Indians?

Mr. DAWES. If the Senator will get the bill he will see. As soon as the individual Indian takes up his allotment he is to have a patent which shall be of the legal effect that the United States holds in trust this particular tract of land for the sole use and benefit of the particular Indian for the period of twenty-five years, at the end of which time the United States is to give him a patent in fee of the land; and then to that is added a provision that in any particular case the President may extend that twenty-five years' limit so that the United States shall in that particular case hold the land in trust for the Indian a further time.

18 Cong. Rec. 973 (1887).

EXCERPTS FROM THE LEGISLATIVE HISTORY OF S. 2068, 52ND CONG., 1ST SESS. (1892)

The Committee on Indian Affairs report back (S.2068) "a bill extending relief to Indian citizens, and for other purposes," with the recommendation that it pass with an amendment in the nature of a substitute, which strikes out all of the bill after the enacting clause, and insert the words reported in an amended bill herewith reported, reading as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the lands now allotted to or which may hereafter be allotted to any Indians in severalty, or which may be the property of any Indian citizens of the United States, when such Indians under the provisions of any existing law have become or shall become entitled to the benefits of and subject to the laws of any State, and when such lands shall be embraced in and as a part of any county or town organization, so as to enjoy full and equal participation in the benefits of such local government, and when the Indians enjoy their equal privileges as citizens, shall be subject to State and local assessment and taxation the same as any other lands similarly located in such State: *Provided, however,* That nothing herein contained shall authorize the sale or incumbrance of any such land on the account of such assessment and taxation, or in any manner interfere in the trust in which such lands are held by the United States while such trust continues: *And provided further,* That during the continuance of said trust said taxes so assessed and levied shall be paid from the Treasury of the United States to the county treasurer, or other legally authorized officer of the county or municipality to which said taxes are payable, at such times as said taxes shall become due and payable: *And also provided further,* That said*

taxes shall only be paid on the receipt of the sworn statement of the county treasurer, or other legally authorized officer of the county or municipality to which said taxes are payable, showing that such tax has been legally assessed and levied, and that said tax is then due and payable, accompanied by the certificate of the Secretary of the Interior that said lands are within the State and county described in said statement, and that the lands therein described have been allotted in severalty, or belong to Indian citizens of the United States, and that he is satisfied, after such sufficient inquiry, that the assessment of the lands for taxation is a fair and reasonable one, and the taxes levied just and equitable, both independently and in proportion to the valuation and taxation of lands in the same county, town, or other municipal corporation: *And provided further*, That no moneys shall be so paid for road or highway taxes which by the laws of the State may be discharged by work, but the Indians owning such lands may be required to so discharge such taxes: *And provided further*, That the Secretary of the Interior shall be satisfied, and so certify, that the public expenditure of such taxes is fairly made to give the lands of such Indians their just share of benefit.

Sec. 2. That from and after the passage of this act there shall be paid annually, from any moneys in the Treasury not otherwise appropriated, such sum as shall be necessary to pay said taxes so certified under section one of this act.

[T]he following letter from the Commissioner of Indian Affairs gives his views upon the bill [excerpts]:

[T]he matter to which Senator Manderson refers is unquestionably an evil attendant upon the allotment of lands in severalty to the Indians with a title inalienable for a specified number of years, during which the land cannot be taxed. . . .

The Government . . . has wisely exempted Indian allotments from taxation for a period of twenty-five years, or longer, at the discretion of the President. So far as I am able to form an opinion on the subject, it seems to me that this nontaxable provision, coupled with the proviso that the land shall be inalienable for twenty-five years, is absolutely essential for the success of the scheme of individualizing ownership in Indian lands. . . .

[A]nd thus hasten the day when the Indians will become citizens in fact, able and willing to bear all the burdens of citizenship. . . .

This is necessary as a matter of good faith to the Indians who have ceded their lands to the government on the condition that their allotments should be inalienable for twenty-five years and exempt from taxation. . . .

[A] portion of the income of which shall be devoted to the payment of the taxes upon the allotted lands during the period wherein they are exempt from individual taxation.

S. Rep. No. 1003, 52nd Cong., 1st Sess. 1-4 (1892).

Mr. COCKRELL. I should like to know who pays the taxes in the end? Are we to understand that the people of the United States are for twenty years to pay all the taxes out of their own funds upon the lands which are allotted in severalty to Indians? . . .

24 Cong. Rec. 1196 (1893).

Mr. COCKRELL. . . . and here is a proposition that these Indians, taking these lands free of all debt, drawing their annuities, able-bodied, stout, athletic fellows, are to sit upon that land for twenty years and make all the people of the United States pay their taxes.

. . . They have a trust fund. Let these taxes come out of that fund. . . .

24 Cong. Rec. 1196 (1893).

Mr. DAWES. I wish to call the attention of the Senator from Missouri [Mr. Manderson] to the existing situation. It is the United States which exempts all this property from taxation . . .

24 Cong. Rec. 1196 (1893).

Mr. DAWES. The Congress has thought that the best way to make citizens, self-supporting people out of these Indians, was to give them some of the United States land and hold it for them for twenty-five years exempt from taxation . . .

24 Cong. Rec. 1196 (1893).

Mr. COCKRELL. . . . I move to amend the part of the bill which reads: 'That the lands now allotted to or which may hereafter be allotted to any Indians in severalty,' by inserting 'under agreements already made.'

Those lands ought not to be exempted from taxation in the States and the people of the United States made to pay taxes on them. I want it limited. I do not want a provision to be inserted whereby Indians may go speculating in land . . . and make the people of the United States pay taxes on it. . . .

24 Cong. Rec. 1197 (1893).

Mr. MANDERSON. . . . We are in the unfortunate condition that by the act of the United States those lands are not taxable for twenty-five years . . .

24 Cong. Rec. 1197 (1893).

Under the act of February 28, 1887 [General Allotment Act], allotting lands in severalty to Indians on the various reservations, many Indians became citizens of the United States and of the State or Territory in which

said land is located, with all the rights and privileges pertaining thereto; but in doing this the act fails to lay on these Indian citizens all of the responsibilities and burdens full citizenship naturally carries with it. By exempting their lands from taxation for a period of twenty-five years . . .

H.R. Rep. 2509, 52nd Cong., 2nd Sess. 1 (1893).

. . . clearly the Indian's land can not pay tax for a period of twenty-five years from date of act [General Allotment Act] . . .

H.R. Rep. No. 2509, 52nd Cong., 2nd Sess. 2 (1893).

FIFTY-NINTH CONGRESS

SESS. 1. CH. 2348 1906

[182] CHAP. 2348.—An Act To amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized

life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such [183] Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indians, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Approved, May 8, 1906.

CONGRESSIONAL RECORD INDEX

H.R. 11946

H.R. 11946—

To amend section 6 of an act approved February 8, 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Mr. Burke of South Dakota; Committee on Indian Affairs 1110.—Reported back with amendment (H.R. REPORT 558) 2812.—Debated, amended and passed House 3598, 3602.—Referred to Senate Committees on Indian Affairs 3668.—Reported back with amendments (S. REPORT 1998) 4153.—Passed over 5189, 5605.—Debated, amended, and passed Senate 5805.—House concurs in Senate amendments 5980.—Examined and signed 6089, 6100, 6233.—Approved by President 7795.

CONGRESSIONAL RECORD—HOUSE

JANUARY 15

* * *

[1110] By Mr. BURKE of South Dakota: A bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"—to the Committee on Indian Affairs.

* * *

FEBRUARY 21

[2812] Mr. BURKE of South Dakota from the Committee on Indian Affairs, to which was referred the bill

of the House (H. R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," reported the same with amendment, accompanied by a report (No. 1558); which said bill and report were referred to the Committee of the Whole House on the state of the Union.

* * *

MARCH 9

ALLOTMENT OF LANDS TO INDIANS

[3598] Mr. BURKE of South Dakota. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H. R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section 5 of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Terri- [3599] tory to which they may reside;

and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up with said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

With the following amendments:

Page 1, line 6, strike out "twenty-five years or."

Page 2, line 1, strike out "thereafter, if the period has been extended by the President."

Page 2, line 2, before the word "and" insert "the trust period."

At the end of the bill add: "*Provided further*, That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The SPEAKER. Is there objection?

Mr. FINLEY. Mr. Speaker, I reserve the right to object.

Mr. STEPHENS of Texas. Mr. Speaker, I desire to ask the gentleman from South Dakota if the Committee on Indian Affairs has reported this bill; and if not, what committee did it come from?

Mr. BURKE of South Dakota. Mr. Speaker, I desire to say that the Committee on Indian Affairs has made a unanimous report on this bill, and it has the favorable report of the Department. It provides, first, to change the present Indian allotment law, so that an Indian when he takes an allotment does not become a citizen until he gets a fee simple patent. It also provides that the Secretary of the Interior may grant a fee simple patent when, after investigation, he becomes satisfied that the Indian has reached such a state of advancement and civilization that he is capable of managing his own affairs, and the gentleman from Texas ([Mr. STEPHENS] will recall that yesterday this matter was discussed in explanation of why there were so many of these individual cases in the Indian appropriation bill. The practice of the committee has been to put in such cases as might be recommended by the Department, and only such cases, and my recollection is that this provision was in one or more appropriation bills and passed the House at the last session, but that it went out in the Senate.

Mr. STEPHENS of Texas. Is the gentleman aware of the fact that the present Secretary of the Interior is holding up numerous applications for patents at the present time and is not issuing them, no demands having been made, and the allottees are entitled to them, and does he not think this might result in indefinitely preventing these people from becoming citizens of the State in which they live if the bill passed?

Mr. BURKE of South Dakota. I think not, Mr. Speaker; and as I indicated to the gentleman yesterday, I think the original allotment law did not contemplate

that citizenship would go with the mere allotment of land. Of course this bill will not affect the status of any Indian allottees who has taken an allotment prior to this time.

Mr. STEPHENS of Texas. The gentleman will admit it affects his citizenship. He can not become a citizen until the Secretary of the Interior will permit him to become a citizen by issuing to him a patent.

Mr. BURKE of South Dakota. It does not affect the status as to citizenship of Indians who have taken allotments previous to the time when this becomes a law.

Mr. STEPHENS of Texas. Then what reason have you that this should become law?

Mr. BURKE of South Dakota. For this reason: Take it in my State, for instance, the Indians that have not yet received allotments and to whom allotments are now being made are the Indians in the remote portions and reservations that are commonly known as "blanket Indians," and they do not possess one single qualification entitling them to citizenship, and yet it is desirable that the lands be allotted to them. If citizenship goes with allotment, then I do not think there will be any allotment to any such Indians in the future.

Mr. FITZGERALD. I would like to make an inquiry. This bill, if I understand it correctly, makes two changes in the present law. First, it gives to the Secretary of the Interior power to issue patents, regardless of the twenty-five-year restriction, whenever he deems it proper.

Mr. BURKE of South Dakota. Yes, sir.

Mr. FITZGERALD. And, secondly, it changes the law so that the mere allotment of land to an Indian does not confer citizenship upon him.

Mr. BURKE of South Dakota. It leaves him subject only to the jurisdiction of the United States until he gets his fee simple patent.

Mr. FITZGERALD. Are those the only two changes?

Mr. BURKE of South Dakota. Those are the only changes.

Mr. CRUMPACKER. Under the law as it now stands the Secretary of the Interior does not have authority to issue fee simple patents to Indians whom he may conclude are entitled to them?

Mr. BURKE of South Dakota. That is true.

Mr. CRUMPACKER. And if this bill should become a law Congress would still have the power to issue patents in special cases notwithstanding the authority conferred upon the Secretary of the Interior.

Mr. BURKE of South Dakota. Congress would certainly have that power.

Mr. CRUMPACKER. I observed in the Indian appropriation bill that was up for consideration yesterday a number of pages of authority granted to the Secretary of the Interior to issue patents to numerous Indians. Those provisions occupied several pages in the bill, and it struck me that this kind of a law ought to be enacted in order to avoid the necessity of Congressional action in relation to these several cases. I suppose the recommendation of the Committee on Indian Affairs is guided almost entirely by the recommendations of the Interior Department?

Mr. BURKE of South Dakota. Entirely so; and all such provisions as appear in the Indian appropriation bill might go out on a point of order. Now I yield to the gentleman from Wyoming.

Mr. MONDELL. Mr. Speaker, I just came into the House and did not hear the discussion on the bill. As I understand it, at the present time all Indian patents are issued with a non-alienation clause, and that for the time within which the lands are not alienable the Indians, under this bill, would not become citizens.

Mr. BURKE of South Dakota. Not Indians who may take allotments after the passage of this act. It does not affect the status of any Indian who has taken an allotment when it has been approved by the Secretary of the Interior.

Mr. MONDELL. However, it will give the Secretary of the Interior power to withhold indefinitely final patents in fee simple and enable him to deprive them of citizenship.

Mr. BURKE of South Dakota. Not at all. Mr. Speaker, because of the absence of this change in the law they can not obtain a fee simple patent until the expiration of twenty-five years and unless Congress by special act grants them that privilege. The practice has been that in such cases we have granted the privilege on the recommendation of the Secretary of the Interior.

Mr. MONDELL. Under existing law, Mr. Speaker, the Indian becomes a citizen, as interpreted by the court, when he receives his allotment. I believe I am correct in that statement.

Mr. BURKE of South Dakota. That is the holding in the Supreme Court of the United States in the case of *Heff*.

Mr. MONDELL. Now, under this legislation the Indian remains the ward of the Government for twenty-five years after he takes his allotment, unless in the meantime the Secretary of the Interior sees fit to make him a citizen by granting him a patent in fee simple.

Mr. BURKE of South Dakota. Except that Congress may grant that privilege if it sees fit.

Mr. CURTIS. And, further, the agreement might provide that the title should become absolute or a fee simple title should pass, say, in ten years.

Mr. MONDELL. Yes; but—

Mr. CURTIS. The main advantage of this bill is that under existing law the Supreme Court has held that after a patent has issued (the court said the word "patent" was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express), notwithstanding the Indian does not secure a title in fee for twenty-five years, he becomes a citizen of the United States, and that the State courts have full jurisdiction over him, but not over his property.

They can not assess and tax the lands, nor can a State enact a law which will prevent the Government, at the time agreed, conveying the allottee the land in fee. Now, this bill, if enacted, will leave him under the control of the Government until he secures a patent conveying the fee, whether he gets it under an agreement or whether it is issued to him under the law by the Secretary of the Interior. The Supreme Court held that the Indians to whom allotments were made under the act of 1887 were still wards of the nation, in a condition of pupillage or dependency.

[3680] Mr. MONDELL. In other words, Mr. Speaker, this legislation retains the Indian in his condition as a ward of the nation without rights of citizenship for twenty-five years after he receives his allotment. Whereas under present conditions he becomes a citizen upon receiving his allotment. Is not that a fair statement of the situation?

Mr. CURTIS. That is true, unless, as I said a moment ago, the agreement provides that the fee should pass in a shorter time.

Mr. MONDELL. If there is some special provision in a particular piece of legislation. Generally this puts off for twenty-five years the time in which an Indian may become a citizen of the United States.

Mr. CURTIS. Yes, sir—that is, by the mere taking of an allotment.

Mr. MONDELL. I understand.

Mr. CURTIS. He may become a citizen of the United States any minute he desires by leaving the reservation and taking up a residence apart from any tribe of Indians and adopting the habits of civilized life.

Mr. MONDELL. Under this law, however, if he does accept an allotment—and of course every Indian residing on a reservation will take an allotment, or ought to do so—he can not become a citizen within twenty-five years unless the Secretary of the Interior in the meantime shall issue him a patent in fee simple.

Mr. BURKE of South Dakota. Mr. Speaker, let me say to the gentleman he does not become a citizen on taking an allotment until it is approved by the Secretary of the Interior. So the Secretary of the Interior now has it within his power to withhold citizenship; yet the Indian may take an allotment.

Mr. MONDELL. Mr. Speaker, is a point of order pending?

Mr. FINLEY. Mr. Speaker, I reserved the point of order against the bill.

Mr. BURKE of South Dakota. Mr. Speaker, I yield to the gentleman from Montana for a question.

Mr. DIXON of Montana. Mr. Speaker, I want to ask the gentleman from South Dakota [Mr. BURKE] if the purpose of the bill is not to prevent the blanket Indians by wholesale becoming citizens by allotment, and still allow the intelligent Indians on application to become citizens by allotment?

Mr. BURKE of South Dakota. That is the purpose of the law, and, further, to protect the Indians from the sale of liquor.

Mr. CURTIS. It is a very great improvement over existing law.

Mr. DIXON of Montana. I thoroughly concur.

Mr. BURKE of South Dakota. It is in accordance, in my opinion, with what the original allotment law contemplated, and what was considered to be the law until the decision of the Supreme Court last April held otherwise.

Mr. DIXON of Montana. I know a case where the reservation assumed to be open where, under the decision of the Supreme Court, there is no way on earth to prevent the wholesale sale of whisky to those allotted Indians. Under this bill it will stop the sale of it to the blanket Indians.

Mr. FINLEY. Where are the Indians located who will be affected by this bill?

Mr. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

Mr. FINLEY. Within all the States and Territories? What Indians?

Mr. BURKE of South Dakota. The South Dakota Indians probably more than any others. I understand the application of the present law has been held not to apply to Territories.

Mr. FINLEY. Will this bill apply to Indians in the Indian Territory?

Mr. BURKE of South Dakota. I think it would; yes, sir; though I am not sure that I am familiar with the general allotment law as to whether it applies to Indians within the Indian Territory or not.

Mr. FINLEY. In the Indian Territory?

Mr. BURKE of South Dakota. I have said I thought it would, but that I am uncertain.

Mr. FINLEY. Then to that extent it would affect the Indian Territory Indians, would it not?

Mr. BURKE of South Dakota. It would affect no Indian who had taken his allotment.

Mr. FINLEY. To what extent have the Indians in the Indian Territory not taken allotments?

Mr. BURKE of South Dakota. I will yield to the gentleman from Kansas, who is more familiar with that than I am.

Mr. CURTIS. So far as the Indian Territory is concerned, all the Indians have been made citizens of the United States, and they are citizens now. The allotments have all been made to the Seminoles; nearly all to the Creeks. They are being made to the Chickasaws, the Choctaws, and the Cherokees.

Mr. FINLEY. How many Indians in the Indian Territory have received their allotment?

Mr. CURTIS. That would be very hard to say. There are about 4,000 allotments yet to be made to the Choctaws and Chickasaws, but the patents have not been delivered to those who have been allotted in those two

tribes; nearly 7,000 patents have been delivered to members of the Cherokee tribe; nearly all patents have been delivered to the members of the Creek tribe, and allotments are complete among the Seminole tribe.

Mr. FINLEY. Would not the passage of this bill have the effect of delaying it?

Mr. CURTIS. It would not have that effect in the Indian Territory, because they were not included in the act of 1887; and the Government has made special agreements with the five tribes in the Indian Territory, and this law would in no way affect them.

Mr. FINLEY. I understood the gentleman from South Dakota to say a moment ago that it would apply to the Indians in the Indian Territory.

Mr. BURKE of South Dakota. I stated I did not know, and I yielded to the gentleman from Kansas, who did.

Mr. CURTIS. This law never applied to the Indian Territory.

Mr. FINLEY. Then I understand it does not apply to the Indians in the Indian Territory?

Mr. BURKE of South Dakota. It seems not.

Mr. KEIFER. I wish to ask the gentleman a question or two.

Mr. BURKE of South Dakota. I yield to the gentleman.

Mr. KEIFER. I want to know what there is in the bill that he has prepared that excludes it from general operation upon the Indian tribes in the Indian Territory.

Mr. BURKE of South Dakota. The gentleman from Kansas has just explained, I thought, that particular point.

Mr. KEIFER. A general law is likely to apply generally. Is there any reservation in this bill?

Mr. CURTIS. Not in this bill; this is simply an amendment to section 6 of the act of 1887. The act of

1887 excludes the Indians of the Indian Territory. Now, there is nothing in this bill bringing them within its terms. Therefore the two acts would be construed together, and under the rules of law it would be held that the original act not applying to the Indians in the Indian Territory, this act amending it would not apply to them. Now we have special agreements with the five tribes, under which allotments are being made to them. We have a bill pending, which will go to conference within a day or two, providing for final settlement of all their affairs. We have special provisions in the various agreements in regard to the sale of intoxicating liquors which have not been put in other agreements with Indians in the United States, and they have always been dealt with separately and distinctly. The agreements provide the conditions under which the deeds or patents shall be issued, which shall be subject to alienation and when they may be alienated; that homesteads shall not be disposed of for certain periods. As this bill only affects Indians with whom agreements are hereafter to be made, it can not under any circumstances apply to the members of the Five Civilized Tribes.

Mr. MONDELL. I fail to find any feature in your bill, from a hasty examination of it, that limits its provisions—

Mr. BURKE of South Dakota. Read the first line of the bill—

Mr. MONDELL (continuing). To future agreements with Indians.

Mr. CURTIS. I have heard the bill read and as I understand it, it only applies to agreements hereafter to be made.

Mr. BURKE of South Dakota. It only amends section 6 of the act of 1887.

Mr. KEIFER. The gentleman from Kansas makes a clear statement as to the existing law as to how it would apply, but the general rule is—

Mr. ADAMS of Pennsylvania. Mr. Speaker, I make the point of order that we can not hear.

The SPEAKER. The House will be in order.

Mr. BURKE of South Dakota. I yield to the gentleman from Ohio.

Mr. KEIFER. Not for any particular time. I was going to say to the gentleman from Kansas that the general rule is that a general law will repeal or supersede another general law unless there is some reservation against it, and it looks to me as though now, to avoid confusion, you better put some reservation in this bill if there is none there now.

Mr. BURKE of South Dakota. Let me state to the gentleman from Ohio that we have this proviso on the bill:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

[3601] Now, we certainly can not legislate to change the status of any citizen whose status has been fixed, and the Supreme Court in the Heff case state that we have not that right without the consent of the citizen to be affected and the consent of the State within which he resides.

Mr. KEIFER. I have no objection to that statement, but it does not cover the objection. It applies only to conditions that are already fixed; but there are cases that are to come, of applications to be made, allotments to be made in the future, and this may embarrass conditions existing in the Indian Territory; and no matter "whether there is a reservation in the act of 1887 or not, there is no reservation in this, and that is what I suggest—that the gentleman put in such a reservation. I am not opposing the bill.

Mr. CURTIS. A very few words would cover it, simply providing that the provisions of this act shall not extend to the Indians in the Indian Territory.

Mr. KEIFER. I suggest that had better be put in, so as to avoid any confusion.

Mr. FITZGERALD. I think the gentleman from Ohio entirely misunderstands this bill. The act of 1887—the general allotment act—which is known as the "Dawes Act," authorized the President to allot lands to Indians, excepting from the operations of the act the lands of the Five Civilized Tribes.

Mr. KEIFER. That has been stated over and over again; but this bill does not except from that, and that is the trouble. The gentleman comes in without having heard the discussion——

Mr. FITZGERALD. If the gentleman will wait a moment, he will find out that I not only have heard the discussion, but that I understand this, which he does not.

Mr. KEIFER. That is the gentleman's ipse dixit about it.

Mr. FITZGERALD. This bill which is now offered amends one section of the general allotment act. Does the gentleman contend that one section of that act, by being amended, repeals the reservation contained in the first part?

Mr. KEIFER. Certainly not. It does not affect that so far as it relates to the original act; but it does take the place, probably, of the act and gives a general application.

Mr. BURKE of South Dakota. I yield to the gentleman from Kansas [Mr. CURTIS] for the purpose of suggesting an amendment.

Mr. CURTIS. Mr. Speaker, I suggest the following amendment:

Provided further, That the provisions of this act shall not extend to the Five Civilized Tribes.

Mr. LACEY. In the Indian Territory.

Mr. CURTIS. In the Indian Territory.

The SPEAKER. Is there objection to the consideration of the bill?

Mr. FINLEY. One moment. I understand the gentleman from South Dakota to say as to these blanket Indians that parties could go in under the laws of the United States and sell them intoxicating liquors. Is that true?

Mr. BURKE of South Dakota. Under the decision in the Heff case, if liquor is sold to an Indian and the Indian happens to be an allottee, the person selling the liquor to him can not be prosecuted under the laws of the United States which prohibit the sale of liquor to the Indians.

Mr. FINLEY. To what extent will this bill cut off the present or prospective right of suffrage from the blanket Indians?

Mr. BURKE of South Dakota. I can only answer that question by guessing at the number of Indians who have not taken their allotments, and I have endeavored to get that information.

Mr. FINLEY. Will it cut off the right of suffrage from any of the blanket Indians?

Mr. BURKE of South Dakota. Yes; I think it will.

Mr. CURTIS. None who have it now.

Mr. BURKE of South Dakota. It will not affect any who now enjoy that privilege.

Mr. FINLEY. But it will prevent the extension of the privilege to blanket Indians in the future until such time as they receive their patents.

Mr. BURKE of South Dakota. Yes.

Mr. FINLEY. And the gentleman is of the opinion that the blanket Indians as a rule are unfit for the exercise of suffrage?

Mr. BURKE of South Dakota. I most certainly am of that opinion.

Mr. STEPHENS of Texas. In what respect will it prevent the sale of whisky on the reservations to these Indians?

Mr. BURKE of South Dakota. I do not know that it will have any particular effect, because if liquor is sold now on the reservations it is a violation of the law.

Mr. STEPHENS of Texas. I would like to ask the gentleman if he can not frame an amendment that would protect them from being sold whisky when they are at the Capitol. [Laughter.]

Mr. BURKE of South Dakota. I do not think they have any right to sell liquor here or anywhere else to the Indians. I will yield to the gentleman from Minnesota.

Mr. STEENERSON. I understand the object of this bill is to apply to those Indians who hereafter, after the passage of this proposed act, shall be allotted lands in severalty?

Mr. BURKE of South Dakota. Yes.

Mr. STEENERSON. That the mere allotment of lands to such Indians in severalty shall not operate to make them citizens within the meaning of the liquor law?

Mr. BURKE of South Dakota. That is right.

Mr. STEENERSON. It can not affect those who already enjoy the high privilege of purchasing liquor?

Mr. BURKE of South Dakota. Certainly not.

Mr. STEENERSON. I understand further that in the proviso to this bill it is provided for granting lands in fee without any restriction; that that provision is not limited. That applies to all Indians anywhere that have allotments?

Mr. BURKE of South Dakota. It does.

Mr. STEENERSON. And is operative whether allotment has already been made or will be made in the future?

Mr. BURKE of South Dakota. Yes. Now I will yield to the gentleman from Wyoming.

Mr. MONDELL. Mr. Speaker, I would like to ask the gentleman from South Dakota in what manner this bill affects the status of Indians to whom allotments have been made at this time and who have heretofore enjoyed the privileges of citizenship?

Mr. BURKE of South Dakota. I will answer the gentleman's question by stating that it does not affect such

Indians any more than it affects the Members of this House so far as the question of citizenship is concerned.

Mr. MONDELL. Well, Mr. Speaker, that is a pretty strong statement. The Indian to whom allotment has been made has heretofore been held to be a citizen and granted the right to vote in certain localities. I do not understand that he has been allowed that privilege in all of the States. That privilege has not been exercised in the past by reason of any legislation clearly denominating him a citizen, as I understand it, but by interpretation. Now, we provide in this statute that during the trust period, which is twenty-five years, the Indian may not exercise the rights of citizenship and is not subject to the laws of the State or Territory in which he resides.

The gentleman from South Dakota is a lawyer, I believe, and I am not, but in my mind there is some question—and I want to know if that matter has been carefully considered—as to whether by any possibility this statute could affect the status of Indians who have heretofore been considered, by reason of being an allottee, entitled to the rights of citizenship.

Mr. BURKE of South Dakota. That question has been carefully considered. I think the gentleman is confused in his mind by the belief that because an Indian has the right to vote within a State that therefore he is a citizen; but a man may be a citizen of a State and not be a voter.

Mr. MONDELL. I am not confused on that point. It is true, however, that many Indians have been considered citizens, some of whom have exercised the right of franchise and some of whom have not. I simply want to be satisfied that this legislation would not affect the status of these men who have heretofore been exercising the rights of citizenship.

Mr. BURKE of South Dakota. I am positive, Mr. Speaker, that it does not.

Mr. CRUMPACKER. This bill does not affect the status of the voter. That is one of the rights of citizenship; that is fixed by the State itself. In Indiana we

allow a man to vote who is not a Citizen of the United States. An alien who has lived in the State one year, who has declared his intentions to become a citizen, can vote at all elections, but he will not be a citizen for five years; so the question of the voting status of Indians under the law as it exists can not be affected by this bill one way or the other.

Mr. MONDELL. I want to call attention to the fact that Indians have been allowed to vote on the theory that they were citizens and therefore entitled to vote.

Mr. CRUMPACKER. That is in your own State under the State law?

Mr. MONDELL. By reason of the fact of their being citizens of the United States.

Mr. CRUMPACKER. No Congress could take away a right to vote that is granted in your State by any kind of legislation that it could pass.

[3602] Mr. MONDELL. Mr. Speaker, upon the statement of the gentleman from South Dakota [Mr. BURKE] that in the opinion of the members of the committee the bill does not affect the status of Indians to whom allotments have heretofore been made, I have no objection to the legislation.

Mr. KEIFER. Mr. Speaker, the amendment offered by the gentleman from Kansas [Mr. CURTIS] I think has not been reported.

The SPEAKER. The Clerk will report the amendment.

The Clerk read as follows:

Add, at the end of the bill, the following: "*And provided further*, That the provisions of this act shall not extend to the Five Civilized Tribes."

The SPEAKER. The question is on agreeing to the amendments.

The question was taken, and the amendments were agreed to.

The SPEAKER. The question now is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time; read the third time, and passed.

On motion of Mr. BURKE of South Dakota, a motion to reconsider the last vote was laid on the table.

* * *

CONGRESSIONAL RECORD—SENATE

March 12

* * *

[3668] HOUSE BILLS REFERRED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was read twice by its title, and referred to the Committee on Indian Affairs.

* * *

[4153] REPORTS OF COMMITTEES

* * *

Mr. GAMBLE, from the Committee on Indian Affairs, to whom was referred the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," reported it with amendments, and submitted a report thereon.

* * *

[5189] ALLOTMENT OF LANDS TO INDIANS

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the

various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was announced as the next business in order on the Calendar.

[5190] Mr. McCUMBER. I ask that the bill may be passed over, retaining its place on the Calendar.

The VICE-PRESIDENT. At the request of the Senator from North Dakota, the bill will go over, retaining its place on the Calendar.

* * *

APRIL 20

[5605] ALLOTMENT OF INDIAN LANDS IN SEVERALTY

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," was announced as next in order on the Calendar.

Mr. KEAN. I do not see the Senator from South Dakota [Mr. GAMBLE] who reported the bill in the Chamber at this time, and so I ask that the bill go over.

The VICE-PRESIDENT The bill will go over, at the request of the Senator from New Jersey, without prejudice.

Mr. CLAPP subsequently said: In the absence of the Senator from South Dakota [Mr. GAMBLE] I should like to have the objection withdrawn to the consideration at this time of House bill 11946. The Senator from South Dakota who has the bill in charge is very anxious to have it passed. I hope the Senator from New Jersey will withdraw his objection.

[5606] Mr. KEAN. I do not know that I shall object to the bill, but I should like to have some explanation of it before it is passed. The title would indicate that it is a

bill of some importance and one which would give rise to debate.

Mr. CLAPP. I can make a very short statement in explanation of the bill.

Mr. KEAN. I have no objection to that.

The VICE-PRESIDENT. Does the Senator from New Jersey withdraw his objection to the present consideration of the bill?

Mr. KEAN. I withdraw the objection.

Mr. CLAPP. Mr. President, under the existing allotment law, when an Indian obtains his allotment he becomes a citizen, which divests the Federal Government of all authority over the Indian, have so far as there may be retained a restriction by the Government upon alienation of the allotment by the allottee. This has led to a most deplorable condition in many of the reservations. The purpose of this bill is to provide that in their future allotments the rights of citizenship shall not attach until the expiration of the trust period and the allottee obtains his patent. It is a bill in which the Department is vitally interested and one that should become a law.

The VICE-PRESIDENT. Objection being withdrawn, the bill will be read for the information of the Senate.

The Secretary read the bill; and by unanimous consent the Senate, as in Committee of the Whole, proceeded to its consideration.

Mr. HEYBURN. I should like to ask the Senator from Minnesota a question. I understand him to state that this bill provides that Indians shall only become citizens of the United States after the lapse of the time in which they might prove upon their lands. Is that it?

Mr. CLAPP. Yes.

Mr. HEYBURN. Then here is the condition that confronts us: We have in Idaho the Nez Perce Indians, for instance, and the Coeur d'Alenes, who were provided for the other day. Some of those Indians are now in the possession of full citizenship. Would this bill prevent those

that are not already within the limits of full citizenship from completing their citizenship?

Mr. CLAPP. Yes, sir; it would.

Mr. HEYBURN. Then it would bring two classes of Indians on the same reservation?

Mr. CLAPP. Yes, sir.

Mr. HEYBURN. At 12 o'clock in the day the Indians who had before noon complied with the law and taken their lands in severalty would have one status as citizens and those who did not happen to get in at that time would be shut off from citizenship under this proposed law. It seems to me that there should be some amendment that would prevent a condition where one portion of a tribe would be citizens of the United States and occupy a position above the other portion of the tribe. That would hardly result in harmony in that tribe. It would create an aristocracy of citizenship.

I am in favor of the general principle of the bill, provided it is amended so as to avoid those embarrassments, and they would be serious embarrassments to the two tribes in the State which I in part represent here, because just now their lands are in the process of being allotted.

Mr. CLAPP. Mr. President, the condition to which the Senator refers, I think obtains to-day upon every reservation in the United States under the existing law. A portion of a tribe who have had their allotments made under the existing law advance to certain rights of citizenship. Those who have not received their allotments do not reach that point in citizenship. The trouble under the existing condition is that when they bet their first allotments, their trust deeds, they become citizens. It is true that under this bill those who have heretofore taken their allotments will have the rights of citizenship, because no law that Congress could pass could to-day divest them of the rights which they have, but the bill will for the future cure the evil that is found on these reservations, where the Indians by merely receiving their allotments pass be-

yond the jurisdiction of the Federal Government. We can not avoid the condition to which the Senator referred, because under the existing law there are two classes.

Mr. HEYBURN. I am anxious to perfect the bill rather than to defeat it. Now comes this provision at the top of page 2:

Then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

There is a discrimination in that provision between Indians who live in the Territories and Indians who live in the States, which I doubt if the Senator who prepared this bill intended should exist.

Mr. CLAPP. I do not think it exists, because no State could pass such a law.

Mr. HEYBURN. Well, then, why provide, as is provided in this bill? Of course, a State can not pass such a law after the Indians do become citizens, but why provide that a Territory shall not pass any law denying the Indians within a Territory the equal protection of the law?

Mr. CLAPP. Because we are legislating now for the Territories and not for the States. A State could not take away the rights of citizenship if it wanted to. We are legislating for the Territories, and provide in this bill that no Territory shall do it.

Mr. HEYBURN. Yes; but we use the words "State or Territory" in defining the laws to which they should be subject in line 4, on page 2.

Mr. CLAPP. No, sir; we use the words "State or Territory" in defining the rights that the Indian attains to. The bill provides:

Every allottee shall have the benefit of and be subject to the laws, both civil and criminal——

Mr. HEYBURN. Well, he already is in a State.

Mr. CLAPP. Not unless he has got his allotment he is not.

Mr. HEYBURN. The bill says "every allottee." It has been held by the Supreme Court of the United States recently that every allottee has attained to citizenship and has those rights, of course. There was a doubt about this until a recent time, but it has been settled.

Mr. CLAPP. What would the Senator like to suggest in the way of amendment?

Mr. HEYBURN. I should like to have time to look the bill over and make a suggestion.

Mr. CLAPP. I do not wish to take up the time of the Senate with a discussion of this bill this morning.

Mr. McCUMBER. Let me call the attention of the Senator——

Mr. GALLINGER. I ask that the bill may go over.

Mr. McCUMBER. Let me call the attention of the Senator to one matter. We are simply repeating the law as it now stands with reference to the Indians, and what has been the law ever since 1887. This bill does not add to it, but, on the contrary, the exact language of the law of February 8, 1887, has been recopied into this bill; so that it will not affect the question whether it comes in again or whether it does not.

Mr. HEYBURN. I should like to ask the Senator——

Mr. GALLINGER. I ask that the bill may go over.

The VICE-PRESIDENT. Under objection, the bill will go over without prejudice.

* * *

[5805] ALLOTMENT OF INDIAN LANDS IN SEVERALTY

The bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the

Indians, and for other purposes," was announced as next in order.

The VICE-PRESIDENT. On April 20 last the bill was considered as in Committee of the Whole, and was read.

The Senate, as in Committee of the Whole, resumed the consideration of the bill, which had been reported from the Committee on Indian Affairs with amendments.

The first amendment was, on page 3, line 2, after the word "removed," to insert "and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent;" so as to make the proviso read:

Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.

The amendment was agreed to.

The next amendment was, on page 3, line 8, to strike out the words "the Five Civilized Tribes" and insert "any Indians in the Indian Territory;" so as to make the additional proviso read:

And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory.

The amendment was agreed to.

Mr. CLAPP. I desire to offer an amendment to the bill.

The VICE-PRESIDENT. The amendment will be stated.

The SECRETARY. Add at the end of the bill the following:

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expira-

tion of the trust period, said allotment shall be canceled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian and shall cause to be issued to said heirs and in their names a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time, and passed.

* * *

CONGRESSIONAL RECORD—HOUSE

April 27

* * *

[5980] ALLOTMENT OF LANDS TO INDIANS

The SPEAKER laid before the House the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians of the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," with Senate amendments.

The Senate amendments were read.

Mr. SHERMAN. Mr. Speaker, I move that the House concur in the Senate amendments.

The motion was agreed to.

On motion of Mr. SHERMAN, a motion to reconsider the last vote was laid on the table.

* * *

[6089] ENROLLED BILLS SIGNED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes;"

* * *

CONGRESSIONAL RECORD—SENATE

April 30

[6100] ENROLLED BILLS SIGNED

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes;" and

* * *

CONGRESSIONAL RECORD—HOUSE

* * *

[6233] H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

* * *

[7795] MESSAGE FROM THE PRESIDENT OF
THE UNITED STATES

A message, in writing, from the President of the United States was communicated to the House of Representatives by Mr. BARNES, one of his secretaries, who also informed the House of Representatives that the President had approved and signed bills of the following titles:

On May 8, 1906;

H.R. 11946. An act to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

* * *

HOUSE OF REPRESENTATIVES

59th Congress, 1st Session

Report No. 1558

 ALLOTMENT OF LANDS IN SEVERALTY TO
CERTAIN INDIANS

February 21, 1906,—Committed to the Committee
of the Whole House on the state of the Union and
ordered to be printed

Mr. BURKE, of South Dakota, from the Committee
on Indian Affairs, submitted the following

REPORT.

[To accompany H.R. 11946]

The committee on Indian Affairs, to whom was referred House bill 11946, submit the following report:

The committee have amended the bill and, as amended, recommend that it do pass.

The amendments adopted are as follows:

In line 9, page 1, after the word "of," strike out the words "twenty-five years or," and strike out all of line 10, and insert in lieu thereof the words "the trust period."

In line 1, page 3, after the word "time," insert the word "to."

In line 4, page 3, after the word "removed," add an additional proviso, as follows:

Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.

This bill proposes to amend the general Indian allotment law of 1887, and changes section 6 of said act so that hereafter, whenever an allotment of land is made to any Indian, citizenship will be withheld from such Indian during the trust period. It has generally been supported that where Indians had taken allotments under the general allotting law that they were still wards of the nation and subject to the jurisdiction only of the United States, and in cases where persons were prosecuted for selling liquor to Indians the courts assumed jurisdiction, regardless of whether the Indians had taken an allotment or not, but upon April 10, 1905, the Supreme Court of the United States decided otherwise in a case entitled "Matter of Heff," reported in 197 U.S. Reports, page 488, the opinion of the court being by Mr. Justice Brewer.

In that case Heff was convicted in the district court of the United States in the district of Kansas, under an indictment for having sold certain intoxicating liquor to an Indian and a ward of the Government; upon conviction he was sentenced to imprisonment for a period of four months and to pay a fine of \$200 and the costs of the prosecution. He appealed, and the court of appeals of the eighth circuit sustained the decision of the district court, and he presented an application for a writ of habeas corpus to the Supreme Court. In effect the court holds that under the law, when an Indian takes an allotment, that he then becomes a citizen of the State or Territory in which he may reside and subject to the laws thereof, and is no longer a ward of the nation, subject to the police regulations on the part of Congress. In concluding the opinion the court says:

We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The district court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice Harlan dissented.

Since this decision was rendered there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians, and in the opinion of this committee it is advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States.

The bill also provides and authorizes the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and

no longer subject to the exclusive jurisdiction of the United States.

In the opinion of the committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

The bill is recommended very strongly by the Commissioner of Indian Affairs and the Secretary of the Interior, and the reports are herewith submitted and are as follows:

DEPARTMENT OF THE INTERIOR,

Washington, February 14, 1906.

Sir: I am in receipt of your letter of the 16th ultimo, inclosing H.R. 11946, being "A bill to amend section six of an act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,'" and in reply to your request for a report I inclose herewith copy of a letter from the Commissioner of Indian Affairs, dated the 8th instant, in which he suggests several amendments, and says that "if the bill is clarified by the amendments suggested there appears to be no good ground for objecting to it. The provision for fee-simple patents is especially desirable legislation, and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible method."

The views expressed by the Commissioner of Indian Affairs and the amendments suggested meet with my approval, and the passage of the bill is recommended.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS,
House of Representatives.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 8, 1906.

SIR: I have the honor to acknowledge the receipt, by your reference of January 18, 1906, for report of a letter from Hon. J. S. Sherman, chairman of the Committee on Indian Affairs, House of Representatives, who inclose a copy of H. R. 11946, entitled "A bill to amend section 6 of an act approved February 8, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.'"

It changes section 6 to read as follows:

"That at the expiration of twenty-five years or thereafter, if the period has been extended by the President, and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits

of the United States to whom allotments shall have been made, and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

The act of February 8, 1887 (24 Stat. 388), known as the general-allotment act, provides that after approval of allotments the Secretary of the Interior "shall cause patents to issue therefor in the names of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period." * * *

Section 6 makes every Indian allottee under the act subject to the laws, both civil and criminal, of the State or Territory in which he may reside, immediately upon the issuance of a trust patent, and declares every Indian born within the United States, to whom an allotment shall have been made under any law or treaty, to be a citizen of the United States.

The bill under consideration postpones the time when an allottee taking lands after it is enacted is to become subject to the laws of the State or Territory of his residence and when citizenship is to be acquired until the issuance of the final or fee-simple patent—a period of twenty-five years, which may be indefinitely extended by the President.

Experience has demonstrated that citizenship has been a disadvantage to many Indians. They are not fitted for its duties or able to take advantage of its benefits. Many causes operate to their detriment. Some communities are too indifferent and others are financially unable to enforce the local laws where Indians are involved. The result is that the newly enfranchised people are free from any restraining influences. Degraded by unprincipled whites, who cater to their weaknesses, no protection is given them, because the United States courts have no jurisdiction and the local authorities do not enforce State laws.

The bill goes further, and makes ample provision to meet all cases where it would be for the best interest, of the allottees to make citizens of them. It authorizes the Secretary of the Interior, in his discretion, "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, at any time cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."

This provision is perhaps the most important in the bill. It is a long step in the right direction, and the great

need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and to take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned. Through superintendents, agents, inspectors, and other officers the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant.

In the past the Indian Office has made many recommendations for special legislation authorizing you to gratify the aspirations of individual Indians for citizenship by issuing to them patents in fee for their lands; but as a fundamental principle of good government, special legislation should be avoided and both the Department and members of Congress relieved of the importunities of interested parties for enactment designed to benefit only themselves.

The proposed amendment will not only substitute general for special legislation, but for those allottees who are not fitted for the responsibilities of citizenship it will provide a probationary period during which any who have both the ability and the ambition may prepare themselves for the desired change.

It may be argued that the bill leaves in some doubt the status of those Indians who will be allotted after it becomes law. In cases where the surplus lands are re-

tained and the reservation boundaries kept intact the allottees would doubtless continue wards of the Government and be subject only to the laws of the United States; whereas if the surplus lands be opened to settlement and the reservation substantially abolished, the question of jurisdiction might become a serious one. It would therefore, perhaps, be well to add the following proviso:

"Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The first part of amended section 6 will not make allottees subject to the laws of the State in which they reside in any case until the expiration of twenty-five years. The proviso to that section contemplates the shortening of the trust period and removes all restrictions as to the sale, incumbrance, or taxation on the issuance of a fee-simple patent. A previous provision of the section makes such patentees citizens of the United States. Although it would probably be held that a person who becomes a citizen of the United States thereby becomes subject to the laws of the State of which he is a resident. I think it would be wiser to remove all doubt by amending the first section by striking out the words "twenty-five years or thereafter, if the period has been extended by the President," and insert in lieu thereof the words "the trust period." Line 1, on page 3, also should have the word "to" inserted after the word "time."

If the bill is clarified by the amendments suggested there appears to be no ground for objecting to it. The provision for fee-simple patents is especially desirable legislation and is in harmony with the spirit of our law, while the present method of granting individual Indian citizens the control of their real estate by special enactment is tolerable only in the absence of any other possible

method. It is therefore most heartily recommended that this bill receive your approval.

Very respectfully,

F. E. LEUPP, *Commissioner.*

The SECRETARY OF THE INTERIOR.

59th Congress
1st Session

Report
No. 1998

SENATE

ALLOTMENT OF LANDS IN SEVERALTY
TO CERTAIN INDIANS

MARCH 23, 1906.—Ordered to be printed.

Mr. GAMBLE, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany H.R. 11946]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 11946) to amend section 6 of an act approved February 8, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," report the same and recommend that the same do pass with the following amendments:

On page 3, in line 4, after the word "removed," insert the following "and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

On page 3, in lines 8 and 9, strike out the following: "Five Civilized Tribes," and insert in lieu thereof the following: "any Indians in the Indian Territory."

[Balance of Report same as H. Rep. No. 1558, *supra*.]

Act of Feb. 26, 1927

(44 Stat. 1247)

SIXTY-NINTH CONGRESS

SESS. II. CHS. 215 1927.

[1247] CHAP. 215.—An Act To authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States.

Be it enacted by the State and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent of an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

Approved, February 26, 1927.

CONGRESSIONAL RECORD INDEX

S. 2714

. . . .

S. 2714—

To authorize the cancellation under certain conditions of patents in fee simple to Indians for allotments held in trust by the United States.

Mr. Harreld; Committee on Indian Affairs, 2630.—Reported with an amendment (S. Rept. 536), 6763.—Amended and passed Senate, 7272.—Referred to House Committee on Indian Affairs, 7311.

CONGRESSIONAL RECORD—SENATE

JANUARY 23

. . . .

[2630] By Mr. HARRELD: A bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States;

. . . .

CONGRESSIONAL RECORD—SENATE

[6763] REPORTS OF COMMITTEES

. . . .

Mr. HARRELD also, from the Committee on Indian Affairs, to which was referred the bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States, reported it with an amendment and submitted a report (No. 536) thereon.

. . . .

CONGRESSIONAL RECORD—SENATE

APRIL 10

[7272] CANCELLATION OF CERTAIN
PATENTS TO INDIANS

The bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States was considered as in Committee of the Whole. The bill had been reported from the Committee on Indian Affairs with an amendment, on page 1, line 9, after the word "without," to insert the words "the consent or," so as to make the bill read:

Be it enacted, etc., That the Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

. . . .

CONGRESSIONAL RECORD—HOUSE

* * *

SENATE BILLS REFERRED

[7311] S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States; to the Committee on Indian Affairs.

* * *

CONGRESSIONAL RECORD INDEX

S. 2714

* * *

S. 2714—To authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States.

Reported back (H. Rept. 1896), 2583.—Passed House, 4350.—Examined and signed, 4523, 4566.—Presented to the President, 4641.—Approved [Public, No. 653], 4892.

* * *

CONGRESSIONAL RECORD—HOUSE

* * *

[2583] Mr. WILLIAMSON: Committee on Indian Affairs. S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States; without amendment (Rept. No. 1896). Referred to the Committee of the Whole House on the state of the Union.

* * *

CONGRESSIONAL RECORD—HOUSE

FEBRUARY 21

* * *

[4350] CANCELLATION OF PATENTS
IN FEE SIMPLE TO INDIANS FOR
ALLOTMENTS HELD IN TRUST BY
UNITED STATES

The next business on the Consent Calendar was the bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States.

The Clerk read the title of the bill.

The SPEAKER: Is there objection to the present consideration of the bill?

There was no objection.

The Clerk read the bill, as follows:

Be it enacted, etc., That the Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

The bill was ordered to be read a third time, was read the third time, and passed.

A motion to reconsider the vote by which the bill was passed was laid on the table.

* * *

CONGRESSIONAL RECORD—SENATE

* * *

[4523] ENROLLED BILLS AND JOINT
RESOLUTION SIGNED

* * *

S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States;

* * *

CONGRESSIONAL RECORD—HOUSE

FEBRUARY 23, 1927

* * *

[4566] ENROLLED BILLS AND JOINT
RESOLUTION SIGNED

* * *

S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States;

* * *

CONGRESSIONAL RECORD—SENATE

* * *

[4641] S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States;

* * *

CONGRESSIONAL RECORD—SENATE

FEBRUARY 26

* * *

[4892] PRESIDENTIAL APPROVALS

S. 2714. An act to authorize the cancellation, under certain conditions, of patents in fee simple, to Indians for allotments held in trust by the United States; and

* * *

SENATE

69th Congress
1st SessionReport
No. 536

TO AUTHORIZE THE CANCELLATION, UNDER CERTAIN CONDITIONS, OF PATENTS IN FEE SIMPLE TO INDIANS FOR ALLOTMENTS HELD IN TRUST BY THE UNITED STATES

April 2, 1926.—Ordered to be printed

Mr. HARRELD, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2714]

The Committee on Indian Affairs, to whom was referred the bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States, having considered the same, report favorably thereon, with the recommendation that the bill do pass with the following amendment:

Page 1, line 9, after the word "without," add the words "the consent or."

This is a departmental bill, and the facts are fully set forth in letter from the Secretary of the Interior under date of January 18, 1926, which is attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, January 18, 1926.

Hon. J. W. HARRELD,
*Chairman Committee on Indian Affairs,
 United States Senate.*

MY DEAR SENATOR HARRELD: Inclosed for your consideration is a draft of a proposed bill to authorize the Secretary of the Interior, under certain conditions, to cancel patents in fee issued to Indians within 25 years from the date of their trust patents, or within any extension, by the President, of such 25-year trust period.

The following is in justification of the requested enactment:

The act of May 8, 1906 (34 Stat. L. 182-183), amending section 6 of the act approved February 8, 1887 (24 Stat. L. 388), provides:

"That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent."

During the year 1919, and later, the then Secretary caused a great number of patents in fee simple to be issued to adult allottees, or to their heirs of less than one-half Indian blood, without application by the Indians for such patents, believing that such mixed-blood adult Indians were competent and capable of managing their own affairs.

Many of the Indians to whom patents were issued refused to accept them; some of these afterwards accepted the patents unwillingly under the impression that they

would lose the land if they did not take the patents. Some others accepted the patents without protest. Another class, principally of old and ignorant Indians, without understanding the effect of their acts, accepted what the Government offered them.

Practically all these lands have been placed on the tax rolls and some have been sold for nonpayment of assessments.

This department canceled patents issued to two Coeur d'Alene Indians who had refused to accept their patents or to pay taxes, and suit was brought to cancel the assessments. The United States Circuit Court of Appeals, Ninth Circuit, in these two cases, *United States v. County of Benewah* and *United States v. County of Kootenai, Idaho* (290 Fed. 628), held that the Secretary of the Interior had no authority under the act of May 8, 1906, to issue a patent in fee to an Indian allottee during the trust period without an application therefor; that a patent so issued did not pass title, and such patent having been refused, the cancellation of the patent was upheld.

Other undelivered patents issued without application have been canceled, but as there is a question as to whether a patent issued without application is effective, and passes title, when the Indian does not desire such patent, but being unaware of his right to refuse, takes it believing that he must accept for the reason that it has been issued to him by the Government, the department desires legislative authority to cancel such patents where there has been no voluntary sale or encumbrance of the land.

This department is in favor of the issuance of patents in fee to all competent Indians who apply for them; but is not in favor of avoidance of the contracts with allottees to hold their lands in trust for 25 years by causing such Indians unwillingly to accept patents within the trust period, which patents, *prima facie*, subject the lands to taxation and other liens.

Few of the Indians will or can pay taxes, and the result will be loss of their homes and they will become charges upon the State.

It will be less costly to the Government, to the Indians, and to the States, if this department may, in its discretion, cancel some of these unapplied for and unwillingly accepted patents in fee and thereby prevent the loss of the homes of Indians, especially of the old, the disabled, and those having young unallotted children to support. Enactment of the bill is recommended.

Very truly yours,

HUBERT WORK.

HOUSE OF REPRESENTATIVES

69th Congress
2d Session

Report
No. 1896

CANCELLATION OF PATENTS IN FEE SIMPLE TO INDIANS FOR ALLOTMENTS HELD IN TRUST BY UNITED STATES

JANUARY 29, 1927.—Committed to the Committee of the
Whole House on the state of the Union and
ordered to be printed

Mr. WILLIAMSON, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 2714]

The Committee on Indian Affairs, to whom was referred the bill (S. 2714) to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States, having considered the same, report thereon with a recommendation that it do pass.

The purpose of this bill is apparent from its terms, which are as follows:

That the Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration

of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

In 1919, the Secretary of the Interior appointed and commissioned Maj. James McLaughlin, in conjunction with the superintendents of the various Indian reservations, to ascertain and list all "competent" Indians upon the various reservations. In determining the competency of the Indians finally listed in an effort made to ascertain the intelligence, educational qualifications, training and capacity of each individual so listed to transact his or her business. In due course a report was submitted to the Secretary of the Interior.

This report appears to have been used as a basis for issuing some 10,000 patents in fee to allotted trust lands during the years 1919 and 1920, to the Indians found "competent" by the investigation. Many of them protested that they did not want their patents in fee on the ground that they would be unable to pay the taxes and as a result would lose their lands. As a matter of fact a large majority of those receiving the patents in fee could not pay the rapidly accruing taxes and were compelled to either mortgage their lands or to dispose of them at whatever figure they could get. About 9,000 of those receiving these "forced patents," as they are called by the Indians, have either lost their lands through foreclosure or tax deed or disposed of them by sale, often at an inadequate price. Even when the price has been adequate, the proceeds have long since disappeared with nothing to show for them upon the reservations or elsewhere.

Under existing law it has been held by the courts that the Indians have a vested right in the tax-free status of

their allotments during the trust period fixed by law, and that such right can not be taken from them without their consent by the device of a forced patent. Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent, but where forced-patent land has neither been encumbered nor sold by the patentee, such patent ought to be canceled on application made to the Secretary of the Interior. Many Indians under protest accepted their patents and placed them on record in ignorance of their rights in the premises. Such acceptance should not be a bar to cancellation where intervening rights have not accrued.

Taxes, or even tax deeds can not be said to be encumbrances of a character to prevent cancellation as these impositions are not voluntary. Time has not permitted the examination of the statutes of all of the States but as to the States examined provision is made for reimbursement to tax-certificate holders, with interest, in all cases where taxes have been canceled because improperly imposed. All purchasers at tax sale are put upon notice as to any defect in making the tax levy and are not innocent holders for value.

It is believed that no injustice can or will be suffered by anyone as a result of the cancellation of improperly issued patents to Indian trust lands as safeguarded in the bill, and the passage of the measure will in part, at least, remedy a great injustice to a considerable number of Indians.

The bill has the approval of the Secretary of the Interior as appears from the following communication:

[Balance of Report same as S. Rep. No. 536, *supra*.]

Act of Feb. 21, 1931

(46 Stat. 1205)

SEVENTY-FIRST CONGRESS

Sess. III. CHS. 270, 1931

[1205] CHAP. 271.—An Act To amend an Act entitled "An Act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of February 26, 1927 (44 Stat. 1247), authorizing the Secretary of the Interior, under certain conditions, to cancel patents in fee for Indian allotments, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the Act of February 8, 1887 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other

allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this Act shall not apply where any such lands have been sold [1206] for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after the date of such mortgage or deed, and the period of redemption has expired.

Approved, February 21, 1931.

* * *

CONGRESSIONAL RECORD INDEX

H.R. 15267

H.R. 15267—

To amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States."

Mr. Leavitt; Committee on Indian Affairs, 910.—Reported with amendment (H. Rept. 2269), 2193.—Debated, 3411.—Amended and passed House, 3413.—Referred to Senate Committee on Indian Affairs, 3429.—Reported back (S. Rept. 1595), 4661.—Passed Senate, 5194.—Examined and signed, 5341, 5389.—Presented to the President, 5578.—Approved [Public, No. 713], 5750.

* * *

CONGRESSIONAL RECORD—HOUSE

DECEMBER 16

[910] By Mr. LEAVITT: A bill (H. R. 15267) to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States"; to the Committee on Indian Affairs.

* * *

[2193]

REPORTS OF COMMITTEES ON PUBLIC BILLS
AND RESOLUTIONS

* * *

Mr. WILLIAMSON: Committee on Indian Affairs. H. R. 15267. A bill to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States"; with amendment (Rept. No. 2269). Referred to the House Calendar.

* * *

[3411]

JANUARY 28

CANCELLATION OF PATENTS IN
FEE SIMPLE TO INDIANS

Mr. LEAVITT. Mr. Speaker, I call up the bill (H. R. 15267) to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States." This bill is on the House Calendar.

The SPEAKER. The gentleman from Montana calls up a bill which the Clerk will report.

The Clerk read the bill, as follows:

Be it enacted, etc., That the act of February 26, 1927 (44 Stat. 1247), authorizing the Secretary of the Interior, under certain conditions, to cancel patents in fee for Indian allotments, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or part thereof and such mortgages have been satisfied, such

lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, are hereby declared to be held in trust by the United States for a period of 25 years from the date of this act for the benefit of the allottee or his Indian heirs; and the Secretary of the Interior may, in his discretion, cancel such fee patents so far as they cover lands undisposed of and unincumbered by the patentees or Indian heirs, and cause new trust patents to be issued for such lands, to the allottees or their Indian heirs, of the form and legal effect as provided by the act of February 8, 1887 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of this act: *Provided*, That this act shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired."

With the following committee amendment:

On page 2, line 6, the word "heirs," strike out all down to and including the word "act," in line 16, and insert: "may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the act of February 8, 1887 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued."

Mr. STAFFORD. I think the gentleman should make some explanations of this bill.

Mr. LEAVITT. I will state that the gentleman from South Dakota [Mr. WILLIAMSON] has made a special study of this matter, and I will ask him to make the explanation. Mr. Speaker, I yield 10 minutes to the gentleman from South Dakota [Mr. WILLIAMSON].

Mr. WILLIAMSON. Mr. Speaker and gentlemen of the House, along in 1915 the Secretary of the Interior appointed what was known as a competency commission. This commission was sent out to the various reservations throughout the United States to investigate the competency of Indians upon these reservations. They reported to the Secretary of the Interior that among those who had trust patents there were at least 10,000 Indians who were competent to handle and transact their own business. As a result of that, Secretary Lane issued in the neighborhood of 10,000 fee-simple patents to trust patent lands. These were issued without the application and without the consent of the Indians. Many of these patents were issued while the owners were over in France as a part of our forces there. They knew nothing about the issuance of the patents until they returned to this country, when in many cases they found their lands had been patented and assessed and that taxes had accumulated. As a result of this unauthorized action of the Government, many found themselves obliged either to mortgage or dispose of their property in order to meet the tax levies and to prevent their lands from being sold for taxes. Out of the whole number of approximately 10,000 tracts covered by these fee patents the Indians to-day have less than 1,000 left. The lands have either been lost by being mortgaged or have been sold, and very frequently sold for a very inadequate consideration.

When I came to Congress about 10 years ago I took the position that these patents were illegally issued, and succeeded in convincing Secretary Fall that the patents were invalid and that he had a right to cancel all fee patents on unencumbered land upon application of the owner.

During the time he was in office he canceled a number of these patents, but when Doctor Work came in as Secretary of the Interior he said he did not think the Secretary ought to cancel these patents without specific authority of law and refused to act. To meet this situation Congress three years ago passed a bill which authorize the Secretary of the Interior to cancel patents issued without the consent of the Indians upon application of the Indians in those cases where the lands have neither been mortgaged nor sold.

Under the construction given to the act it was not possible to restore the unencumbered portion of lands for which a fee simple patent had been issued if any part of the land covered by the patent had been mortgaged or sold. The result was that those Indians who had either mortgaged or sold a part of their "forced" patent land in order to meet taxes levied against the whole could get no relief as to the part remaining unencumbered. There are a number of cases where these lands have been mortgaged and the mortgages later paid off.

This bill authorizes the Secretary of the Interior to restore the trust-patent status of such portions of land as still remain unsold or unencumbered, and to this is added lands that may have been mortgaged where such mortgage has been paid.

Mr. STAFFORD. Can the gentleman explain what will accrue to the Indian by virtue of this proposed law?

Mr. WILLIAMSON. It will mean this: There are still a few hundred tracts of land for which patents in fee have been issued without the consent of the holders of the trust patents, and if this bill is passed it will enable the Secretary of the Interior, upon the application of these Indians, to cancel the patents in fee to such of their lands as are unencumbered. This will have the effect of restoring their trust-patent status. In other words, this will mean that the lands will no longer be subject to taxation or any other kind of encumbrance, and the Indian will then be able to hold the lands without paying taxes until

the 25-year period of the trust patent has either expired or the extension has expired.

Mr. STAFFORD. Do I understand the gentleman is favorable to the policy of withdrawing the lands from taxation for State purposes?

Mr. WILLIAMSON. I am not particularly favorable to that policy, but that is not the point here at all. The point is these forced fee simple patents were illegally issued. The courts have so held, and the Indians have the undoubted right to have the lands involved restored as trust property. The courts have also held that the Indian has a vested right to the tax-free status of his land; that this is a right he is entitled to insist upon and one that no one has the right to take away from him. As a matter of fact, the Government has taken it away from him, and all we are seeking to do is to restore the land to the status it would have had if no patent in fee had ever been issued.

Mr. STAFFORD. I wish to direct the attention of the gentleman to the clause in the amendment found in lines 24 and 25, page 2, "such patents to be effective from the date of the original trust patents," and ask his interpretation of it. What would be accomplished by that retroactive clause?

Mr. WILLIAMSON. These trust patents carried a clause, which is a part of the law authorizing the trust patent, providing that they shall remain in force for a period of 25 years from the time they were issued. So if these patents are restored they would become effective from the date of the trust patent that was superceded by a patent in fee; in other words, restores them to the status they had before the fee patent was issued. In some cases the 25-year period has been extended either by law or by Executive order, and in those cases the new patents would extend for the 25 years plus any period of extension that may have been granted. In other words, the bill will place the lands in the same condition they would have been if no patent in fee had ever been issued.

Mr. STAFFORD. Will there be any question of taxation involved by virtue of this retroactive feature?

Mr. WILLIAMSON. In many cases, there will be. In some cases there will be trust patents for which patents in fee have been issued and the land, of course, has gone on the assessment rolls and taxes have been paid. That is true in some of the cases where the fee patent has already been canceled. In those cases, under the laws of nearly all the States, the Indian has his recourse by making application to the board of county commissioners for return of the taxes paid. In most cases such taxes have been returned by such boards where application has been filed with the proper showing.

Mr. STAFFORD. It is not proposed to have the national Government reimburse the Indians for the taxes they have paid?

Mr. WILLIAMSON. No; the National Government is not involved in any way. They will have to go for reimbursement to the boards of county commissioners in the counties where the lands are located.

Mr. STAFFORD. And the gentleman states it is the policy of the local tax units to return the taxes after they have been paid?

Mr. WILLIAMSON. I am not familiar with what is being done in other States, but in South Dakota, in every case that has come to my attention where such application has [3413] been filed by an Indian, whose land has been restored to a trust patent status, the boards have restored the taxes to the Indian.

Mr. STAFFORD. To how many cases will this bill apply?

Mr. WILLIAMSON. It is difficult to say how many are remaining. We could not get this information from the Secretary of the Interior in time to put it in this report; but when I made a report on a former bill, about three years ago, there were then remaining approximately 1,000 of these tracts, and my understanding is, from the

information we now have, that there are only between 300 and 400 such tracts of land involved in the United States.

Mr. MORTON D. HULL. Will the gentleman yield?

Mr. WILLIAMSON. Yes.

Mr. MORTON D. HULL. What is the status of the other land that has been alienated, and so forth?

Mr. WILLIAMSON. The land that has been patented and that has either been encumbered or sold by the Indian can not be reached. Nothing can be done in those cases, because, if a man mortgages or if he deeds, that is equivalent to an acceptance of the patent and, so far as that land is concerned, the Indian is without recourse.

Mr. MORTON D. HULL. There is no hope of any restoration, so far as that land is concerned.

Mr. WILLIAMSON. Absolutely none.

The SPEAKER. The question is on the committee amendment.

The committee amendment was agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed.

On motion of Mr. LEAVITT, a motion to reconsider the vote by which the bill was passed was laid on the table.

* * *

REFERRED TO COMMITTEE

* * *

CONGRESSIONAL RECORD—SENATE

* * *

[3429] H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States"; and . . .

* * *

BILLS REPORTED BACK

* * *

[4661] H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States (Rept. No. 1595).

* * *

FEBRUARY 17

[5194]

CANCELLATION OF FEE SIMPLE PATENTS TO INDIANS

The bill (H. R. 15267) to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States" was considered by the Senate, and was read, as follows:

Be it enacted, etc., That the act of February 26, 1927 (44 Stat. 1247), authorizing the Secretary of the Interior, under certain conditions, to cancel patents in fee for Indian allotments, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without encumbrance by the patentees, or Indian heirs, may be given a trust patent status, and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of

the form and legal effect as provided by the act of February 8, 1987 (24 Stat. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this act shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired."

Mr. BRATTON. Mr. President, will the Senator from North Dakota explain this measure?

Mr. FRAZIER. Mr. President, some months ago a bill was passed authorizing the department to make some investigations of what are known as trust patents that had been issued to Indians, sometimes over their protest; and a good many complaints have come in. An investigation was made. On page 4 of the report a list is given of the questions that were sent out. These questions were answered, and investigations were made by the superintendents of the various reservations.

[5195] The department recommends the passage of this bill. Personally, I do not feel that the bill is as strong as it should be; but it is a step in the right direction, and I believe it should be passed.

Mr. BRATTON. What does it do?

Mr. FRAZIER. In cases where patents in fee have been issued to Indians over their protest, where they still have the land, the patent in fee is set aside, and a trust patent is given to the Indians under authority given to the Secretary of the Interior to take that action.

Mr. BRATTON. Do I understand that upon a review of the facts the Secretary of the Interior may set aside a restricted patent and issue an unrestricted one?

Mr. FRAZIER. That is the case, but only in places where these patents in fee have been issued, as I understand, over the protest of the Indians.

Mr. BRATTON. No land could be taken from an Indian under this bill?

Mr. FRAZIER. Oh, no! It is really for the benefit of the Indians.

The PRESIDING OFFICER. The question is on the third reading of the bill.

The bill was read the third time, and passed.

. . . .

CONGRESSIONAL RECORD—HOUSE

. . . .

[5341] H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States";

. . . .

CONGRESSIONAL RECORD—SENATE

. . . .

[5389] H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States";

. . . .

CONGRESSIONAL RECORD—HOUSE

FEBRUARY 20

. . . .

PRESENTED TO PRESIDENT

[5578] H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation under certain conditions of patents in fee simple to Indians for allotments held in trust by the United States";

. . . .

FEBRUARY 23

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MESSAGE FROM THE PRESIDENT

[5750] Sundry messages in writing from the President of the United States were communicated to the House by Mr. Latta, one of his secretaries, who also informed the House that on the following dates the President approved and signed bills of the House of the following titles:

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H.R. 15267. An act to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States."

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HOUSE OF REPRESENTATIVES

71st Congress
3d Session

Report
No. 2269

CANCELLATION OF CERTAIN FEE SIMPLE
PATENTS ISSUED TO INDIANS FOR
ALLOTMENTS WITHOUT THEIR CONSENT

JANUARY 14, 1931.—Referred to the House Calendar
and ordered to be printed

Mr. WILLIAMSON, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany H.R. 15267]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 15267) to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States," having considered the same, report thereon with the recommendation that it do pass with an amendment as follows:

On page 2, line 6, strike out all after the word "heirs"; all of lines 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 to and including the word "act"; and insert in lieu thereof the following:

may be given a trust patent and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to

cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the act of February 8, 1887 (24 Stats. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued:

So that the bill, as amended, will read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of February 26, 1927 (44 Stat. 1247), authorizing the Secretary of the Interior, under certain conditions, to cancel patents in fee for Indian allotments, be, and the same is hereby, amended by adding thereto the following:

"SEC. 2. Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without encumbrance by the patentees, or Indian heirs, may be given a trust-patent status, and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by the act of February 8, 1887 (24 Stats. 388), and the amendments thereto, such patents to be effective from the date of the original trust patents, and the land shall be subject to

any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this act shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired."

The bill as originally transmitted by the department provided that the lands intended to be covered by the bill—

are hereby declared to be held in trust by the United States for a period of twenty-five years from the date of this act for the benefit of the allottee or his Indian heirs.

As there would be no way of identifying the lands to which this provision would apply it would have the result of clouding the title to all allotted trust-patent lands upon which a patent in fee had later been issued.

Your committee also thought it inadvisable to give the lands so restored a different status from that which they would have had had no patent in fee ever been issued. It will be observed by the terms of the amendment no title will be affected until the Secretary of the Interior has been taken affirmative action by canceling the illegally issued patent in fee and in lieu thereof substituted a trust patent, and that when this has been done the lands will have the same status as they would have had if no patent in fee had ever been issued.

In 1915, the Secretary of the Interior appointed and commissioned Maj. James McLaughlin, in conjunction with the superintendents of the various Indian reservations, to ascertain and list all "competent" Indians upon the various reservations. In determining the competency of the Indians finally listed an effort was made to ascer-

tain the intelligence, educational qualifications, training, and capacity of each individual so listed to transact his or her business. In due course a report was submitted to the Secretary of the Interior.

This report appears to have been used as a basis for issuing some 10,000 patents in fee to allotted trust lands during the years 1919 and 1920, to the Indians found "competent" by the investigation. Many of them protested that they did not want their patents in fee on the ground that they would be unable to pay the taxes and as a result would lose their lands. As a matter of fact a large majority of those receiving the patents in fee could not pay the rapidly accruing taxes and were compelled to either mortgage their lands or to dispose of them at whatever figure they could get. About 9,000 of those receiving these "forced patents," as they are called by the Indians, have either lost their lands through foreclosure or tax deed or disposed of them by sale, often at an inadequate price. Even when the price has been adequate, the proceeds have long since disappeared with nothing to show for them upon the reservations or elsewhere.

Under the law as it existed at the time the fee simple patents complained of were issued it has been held by the courts that the Indians have a vested right in the tax-free status of their allotments during the trust period fixed by law, and that such right can not be taken from them without their consent by the device of a forced patent. Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent, but where forced-patent land has neither been encumbered nor sold by the patentee, such patent ought to be canceled on application made to the Secretary of the Interior. Many Indians under protest accepted their patents and placed them on record in ignorance of their rights in the premises. Such acceptance should not be a bar to cancellation where intervening rights have not accrued.

Taxes, or even tax deeds can not be said to be encumbrances of a character to prevent cancellation as these impositions are not voluntary. Time has not permitted the examination of the statutes of all of the States but as to the States examined provision is made for reimbursement to tax-certificate holders, with interest, in all cases where taxes have been canceled because improperly imposed. All purchasers at tax sale are put upon notice as to any defect in making the tax levy and are not innocent holders for value.

Congress, mindful of the injustice and wrong which had been suffered by many of the Indians to whom patents in fee were issued without their application or consent, passed the act of February 26, 1927, by which it authorized the Secretary of the Interior to cancel patents in fee in proper cases where the land covered by the illegally issued patent in fee had been neither mortgaged or sold. Your committee was of the opinion that where land covered by such illegally issued patent had been either mortgaged or sold by the Indian to whom the patent was issued, that such mortgage or sale, as the case might be, would amount to an acceptance of the patent and that he could not be heard to say that such patent had been improperly issued.

It will be observed that this bill goes farther than said act of February 26, 1927, in that it permits such portions of lands for which a patent in fee had been issued without the consent of the grantee which still remained unencumbered and which have not been conveyed to be restored to their trust patent status.

The bill as amended also permits the Secretary of the Interior to cancel patents in fee and restore the trust-patent status of the lands involved in cases where such lands have been mortgaged where such mortgage has been discharged, except in those cases where the lands may have been sold for unpaid taxes assessed after the date of the encumbrance.

The bill is sponsored by the Secretary of the Interior as appears from the following communication:

DEPARTMENT OF THE INTERIOR,
Washington, December 13, 1930.

Hon. SCOTT LEAVITT,
*Chairman Committee on Indian Affairs,
House of Representatives.*

MY DEAR MR. LEAVITT: Inclosed for your consideration is a draft of a proposed bill to amend the act of February 26, 1927 (44 Stat. 1247), entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States."

By this act the Secretary of the Interior was authorized, in his discretion, "to cancel any patents in fee simple, issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent."

Before the passage of this act a number of undelivered patents in fee so issued were canceled by the department and in the cases of *United States v. Kootenai County* and *United States v. Benewah County, Idaho* (290 Fed. 628), the United States Court of Appeals, Ninth Circuit, upheld the cancellations and declared that the patents, which the Indians had refused to accept, did not pass title, and taxes assessed against the lands were declared void.

Following this, a number of other undelivered patents were canceled, where no mortgage or deed to the land or any part thereof, executed by the patentee or heirs, ap-

peared of record. There were, however, many Indians who had receipted for their patents, who claimed that their acceptance was not voluntary. There being a doubt as to the effect of physical delivery of a patent, with or without protest from the patentee, this department submitted the draft of a bill, and recommended its enactment. This became the above-mentioned act of February 26, 1927.

Before and since the approval of the act of 1927, nearly 300 patents have been canceled; but none where the allottee or his heirs had mortgaged or sold all or any part of the allotment. This number is small in comparison with the many patents in fee issued without authority of law during the four years preceding the patents in fee issued without authority of law during the four years preceding the year 1920.

On April 2, 1928 (calendar day, April 3), the following bill was introduced in the Senate, Seventieth Congress, first session: "A bill (S. 3879) to create a commission to investigate the issuance of fee simple patents to Indians not applying therefor, and for other purposes."

A similar bill, H.R. 12663, was introduced on April 3, 1928.

In its letter of May 16, 1928, to the chairman of the Senate Committee on Indian Affairs, and of May 21, 1928, to the chairman of the Committee on Indian Affairs, House of Representatives, the department said, in part, in each case:

"Much of the information to be obtained by the proposed commission aided by existing governmental agencies and bureaus is of record in this department and at the various Indian agencies, and the additional data required to complete each case will be obtained to the fullest extent possible through instructions to field officers of the Indian Service.

"When these reports are received and studied, this department would then be in a position to consider the question of recommending such legislation as may be thought advisable to give relief where needed.

"It is therefore recommended that no action be taken on the present bill."

On June 21, 1928, all superintendents were instructed to procure information which would enable the Government to devise some plan for the welfare of the Indians. Following is a list of the questions contained in the letter of instructions, the answers to which were to be supported by evidence procured after careful investigation:

1. Number of allotment and date of fee patent.
2. Date and manner of delivery of patent, and was it receipted for?
3. If accepted, was such acceptance with or without protest, and was it filed for record in the county? If so, when and by whom?
4. Has the land covered by the patent, or any part of it, been sold or mortgaged by the patentee or by his or her heirs in case of decease?
5. If mortgaged, has such mortgage been released or foreclosed, and has date of redemption expired?
6. If land has been sold by patentee or heirs, what was received for it and was it a fair consideration, paid then, or was it in settleemnt of an old debt?
7. Has any of the land been sold for debt or taxes? (Give particulars.)
8. Has patent been canceled?
9. If canceled, have tax assessments or tax sales been canceled, or paid assessments refunded?

10. What is the present age, mental, physical, and financial condition of the patentee or heirs, if now deceased?

11. What is the source of the Indian's support, and has the Government or the State or county contributed to such support and if so, to what extent?

12. What persons are dependent upon the Indian for support?

13. If the Indian appears to have been defrauded of his property, give particulars, and names and addresses of the persons involved, and if possible their financial standing.

The reports received are not complete, but sufficiently so to show that a large number of Indians have lost their lands through foreclosure of mortgages, or have sold the lands for an inadequate consideration, and in some cases lands have been sold for unpaid tax assessments, made after an Indian had mortgaged or sold some part of his land, and tax certificates or tax deeds issued.

In some cases Indians have sold all their lands, in some a part only, and some mortgages have been satisfied.

There are many cases in which the patentees or their heirs have sold part of their lands and hold the remaining lands, unincumbered by mortgage, any mortgage on all or part of the lands having been satisfied.

If Congress should declare all the lands covered by erroneously issued patents to be held in trust by the United States, where part or all of an allotment remains unsold, and free from mortgage, the number of claims by Indians for redress would be very greatly lessened. Without legislation it will not be long before those who still own lands will lose them.

The attached draft of a proposed bill to amend the act of 1927, will, if enacted, restore the trust on lands in-

cluded in these irregularly issued fee patents, which lands have not been sold by patentees of their Indian heirs, and where any mortgage or all or part of the lands, has been satisfied, but where such lands have been sold for taxes legally assessed, or sold in execution of a judgment for debt incurred after date of a mortgage or deed executed by the allottee or his Indian heirs, and the period of redemption from sale has expired, the act would not apply.

The object in having the reimposed trust take effect from the date of the act is to prevent any further sales or mortgages or tax assessments after a given date. It would take sometime before the department could find the facts in each case which would bring it within the provisions of the act, and to enable the department to cancel the fee patents and cause new patents to be issued, as provided in the proposed bill.

Enactment of a bill, as proposed, is recommended.

Very truly yours,

RAY LYMAN WILBUR.

ACT AMENDED

The act of February 26, 1927 (44 Stat. 1247), which is amended by adding thereto an additional section, reads as follows:

[That the Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.]

SENATE

71st Congress
3d Session

Report
No. 1595

CANCELLATION OF CERTAIN PATENTS IN FEE SIMPLE ISSUED TO INDIANS FOR ALLOTMENTS WITHOUT THEIR CONSENT

JANUARY 26 (calendar day, FEBRUARY 12), 1931.—
Ordered to be printed

Mr. FRAZIER, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany H.R. 15267]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 15267), to amend an act entitled "An act to authorize the cancellation, under certain conditions, of patents in fee simple to Indians for allotments held in trust by the United States," having considered the same, report favorably thereon with a recommendation that the bill do pass without amendment.

The facts are fully set forth in the report of the House Committee on Indian Affairs (H. Rept. No. 2269, 71st Cong., 3d sess.), which is appended hereto and made a part of this report.

[Balance of Report same as H. Rep. 2269, *supra*.]

Act of June 11, 1940
(54 Stat. 298).

AN ACT

[CHAPTER 315]

For the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees and Indian heirs of allottees for all taxes paid on so much of their allotted lands as, having been patented in fee prior to the expiration of the period of trust, without application by or consent of the patentee, has been or may be restored to trust status through cancelation of the fee patent by the Secretary of the Interior: *Provided*, That in any case in which a claim against a State, county, or political subdivision thereof for taxes collected upon such lands while the patent in fee was outstanding has been reduced to judgment, and such judgment remains unsatisfied, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes, including penalties and interest, paid thereon, and upon payment by the State, county, or political subdivision thereof of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case in which a claim has been reduced to judgment and such judgment has been satisfied, the Secretary of the Interior is authorized, upon proof of satisfaction thereof, to re-

imburse the State, county, or political subdivision thereof, for the actual amount of the judgment, exclusive of the costs of litigation.

SEC. 2. There is hereby authorized to be appropriated the sum of \$75,000, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this Act.

Any appropriations made pursuant to this section shall remain available until expended.

Approved, June 11, 1940.

CONGRESSIONAL RECORD INDEX

H.R. 952

* * *

H.R. 952—

For the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid.

Mr. Case of South Dakota; Committee on Indian Affairs, 34.—Reported back (H.Rept. 669), 5932.

* * *

CONGRESSIONAL RECORD—HOUSE

JANUARY 3

* * *

[34] H.R. 952. A bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid; to the Committee on Indian Affairs.

* * *

MAY 22

* * *

[5932] REPORTS OF COMMITTEES ON
PUBLIC BILLS
AND RESOLUTIONS

Under clause 2 of rule XIII,

Mr. MUNDT: Committee on Indian Affairs. H.R. 952. A bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and sub-

sequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid; without amendment (Rept. No. 669). Referred to the Committee of the Whole House on the state of the Union.

* * *

CONGRESSIONAL RECORD INDEX

* * *

H.R. 952—

For the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid.

Debated, 1628.—Passed House, 3007.—Referred to Senate Committee on Indian Affairs, 3037.—Reported back (S. Rept. 1488), 4942.—Passed Senate, 6988.—Examined and signed, 7251, 7258.—Presented to the President, 7347.—Approved [Public, No. 590], 8258.

* * *

CONGRESSIONAL RECORD—HOUSE

FEBRUARY 19

* * *

[1628] RELIEF OF INDIANS WHO HAVE
PAID TAXES ON ALLOTTED LANDS

Mr. CHURCH. Mr. Speaker, I ask unanimous consent that the proceedings by which the bill (H.R. 952) for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid, was stricken from the calendar this morning, be vacated.

Mr. FADDIS. Reserving the right to object, Mr. Speaker, what bill is this?

Mr. CHURCH: The bill is H.R. 952.

Mr. CASE of South Dakota. Mr. Speaker, I further reserve the right to object for the purpose of making an explanation. This is the bill which the gentleman from Missouri [Mr. COCHRAN] asked to have go over without prejudice. The gentleman from North Dakota [Mr. BURDICK] objected to that request, whereupon there were three objections to the consideration of the bill through some misunderstanding. I have spoken to the gentleman from Missouri and also to the gentleman from North Dakota and it is agreeable to them that the bill be restored to the calendar and then be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Illinois [Mr. CHURCH]?

There was no objection.

Mr. CHURCH. Mr. Speaker, I ask unanimous consent that the bill (H.R. 952) be passed over without prejudice.

The SPEAKER. Is there objection to the request of the gentleman from Illinois?

There was no objection.

* * *

[3007] RELIEF OF INDIANS WHO HAVE PAID TAXES ON ALLOTTED LANDS

The Clerk called the next bill, H.R. 952, for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottee and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid.

There being no objection, the Clerk read the bill, as follows:

Be it enacted, etc., That the Secretary of the Interior is hereby authorized, under such rules and regulations as may prescribe, to reimburse Indian allottees and Indian heirs of allottees for all taxes paid on so much of their allotted lands as, having been patented in fee prior to the expiration of the period of trust, without application by or consent of the patentee, has been or may be restored to trust status through cancelation of the fee patent by the Secretary of the Interior: *Provided*, That in any case in which a claim against a State, county, or political subdivision thereof for taxes collected upon such lands while the patent in fee was outstanding has been reduced to judgment, and such judgment remains unsatisfied, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes, including penalties and interest, paid thereon, and upon payment by the State, county, or political subdivision thereof of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case in which such a claim has been reduced to judgment and such judgment has been satisfied, the Secretary of the Interior is authorized, upon proof of satisfaction thereof, to reimburse the State, county, or political subdivision thereof, for the actual amount of the judgment, exclusive of the costs of litigation.

SEC. 2. There is hereby authorized to be appropriated the sum of \$75,000, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this act.

Any appropriations made pursuant to this section shall remain available until expended.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

* * *

CONGRESSIONAL RECORD—SENATE

* * *

[3037] HOUSE BILLS AND JOINT
RESOLUTION REFERRED

* * *

H.R. 952. An act for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid;

* * *

[4942] REPORTS OF COMMITTEES

* * *

Mr. BULOW, from the Committee on Indian Affairs, to which was referred the bill (H.R. 952) for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid, reported it without amendment and submitted a report (No. 1488) thereon.

* * *

MAY 28

[6988] RELIEF OF INDIANS WHO HAVE
PAID TAXES ON ALLOTTED LANDS

The bill (H.R. 952) for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid, was considered, ordered to a third reading, read the third time, and passed.

* * *

CONGRESSIONAL RECORD—HOUSE

* * *

[7251] ENROLLED BILLS AND JOINT
RESOLUTIONS SIGNED

* * *

H.R. 952. An act for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid;

* * *

CONGRESSIONAL RECORD—SENATE

MAY 31

* * *

BILLS EXAMINED AND SIGNED

[7258] H.R. 952. An act for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid;

* * *

CONGRESSIONAL RECORD—HOUSE

* * *

[7347] BILLS AND JOINT RESOLUTIONS
PRESENTED TO THE PRESIDENT

* * *

H.R. 952. An act for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid;

* * *

CONGRESSIONAL RECORD—HOUSE

JUNE 14

* * *

[8258] MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Latta, one of his secretaries, who also informed the House that on the following dates the President approved and signed bills and joint resolutions of the House of the following titles:

* * *

H.R. 952. An act for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid;

* * *

HOUSE OF REPRESENTATIVES

76th Congress
1st Session

Report
No. 669

RELIEF OF INDIANS WHO HAVE PAID TAXES
ON ALLOTTED LANDS

MAY 22, 1939.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. MUNDT, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 952]

The Committee on Indian Affairs, to whom was referred the bill (H.R. 952) for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid, having considered the same, report favorably thereon without amendemnt and recommend that the bill do pass.

This legislation seeks to correct—

an unfortunate situation growing out of an erroneous interpretation by this Department of the provisions of the act of May 8, 1906 (34 Stat. 182) (Secretary of the Interior, March 17 1938)—

under which patents on land allotments were issued to certain Indians without their application during the years 1917 to 1920 and prior to the expiration of their trust periods.

Lands so patented naturally were taxed until the trust status was restored. Many Indians, to keep their lands from being sold for taxes, paid the taxes logically levied by various taxing authorities and thence distributed to sundry and various public bodies. The length of time elapsed and the varying amounts involved for different annual levies to different and varying public bodies make it impractical to seek return of the money by the sundry and various bodies who ultimately received varying portions of the taxes paid. The costs would in many cases exceed the amounts involved and innocent parties would have the costs to pay.

The levy and collection of taxes was a duty imposed upon local units of government by statutory law and the bonds of their officials. This was not their error. The error was by the United States Government.

— Clearly the local authorities were not at fault for taxing such land while patents in fee were outstanding (Secretary of the Interior, March 17, 1938).

The first legislative approach to a solution of this problem was the introduction in the Seventy-fourth and Seventy-fifth Congresses of bills to authorize \$100,000 to examine the records in counties west of the Mississippi River to determine the status of each forced patent. That legislation met the objection that the cost would exceed the amount estimated to be involved. The second approach was the introduction of a bill to grant direct relief to claimants and counties against whom judgments were taken in one State (South Dakota). In reporting to the Claims Committee on that bill in the Seventy-fifth Congress the Secretary of the Interior suggested that the relief sought was of course a question for the considera-

tion of Congress, but that if enacted it should provide for general legislation to meet the situation in the several States involved.

The text of such an amendment is identical with the language of and constitutes the entire wording of the bill now reported, H.R. 952. A similar bill was introduced following that recommendation in the Seventy-fifth Congress (H.R. 10644), and favorably reported by this committee June 9, 1938, shortly before that Congress adjourned.

In suggesting the amendment the Secretary of the Interior said:

The \$75,000 authorized to be appropriated by the bill as amended would be sufficient to take care of all those cases in which judgments have been rendered and those now pending in the courts. It would also leave a balance to reimburse those Indians whose patents in fee may be canceled in future years (report on H.R. 6393, March 17, 1938).

It will be noted that this is less than was first proposed for an examination alone, and indicates that the present approach is the logical one to adopt. It is to be noted that no court costs are to be reimbursed and no attorney's fees are involved. The reduction of the claims to judgments, where done, has been done by district attorneys of the United States. The legislation makes further court costs unnecessary.

The reports on the three bills cited, follow (first on H.R. 952 now pending; second on H.R. 10644, the identical bill in the 75th Cong.; third, the report on H.R. 6393 in the 75th Cong., in which the Secretary of the Interior proposed the wording of the bill herewith recommended for passage):

[Reports on H.R. 952]

DEPARTMENT OF THE INTERIOR,
Washington, April 26, 1939.

Hon. WILL ROGERS,
Chairman Committee on Indian Affairs
House of Representatives.

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on H.R. 952, a bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid.

The unfortunate situation now before us grew out of an erroneous interpretation by this Department of certain provisions in the act of May 8, 1906 (34 Stat. 182), authorizing the Secretary of the Interior, in his discretion, to issue fee-simple patents to Indian allottees whenever he shall find such allottees capable of managing their own affairs. Under this authority it was thought that no application for a patent in fee by the allottee was required, and during the years 1917 to 1920, inclusive, approximately 10,000 fee patents were issued to adult Indian allottees upon the recommendations of competency commissions appointed to ascertain the competency of the allottees. In most of such instances patents were issued without application by or consent of the patentees.

Taxes were levied by the various counties against the lands of the Indians thus receiving these "forced" fee patents. Many of the Indians paid the assessments, on pain of losing their homes, while the lands of others, being unable to pay, were sold for the delinquent assessments.

The action of this Department in issuing fee patents without application from the Indian owners was subse-

quently held to have been without authority in *United States v. Benewah County* and *United States v. County of Kootenai, Idaho* (290 Fed. 628), it being also held that patents so issued did not convey the legal title and that the lands were not subject to taxation during the years the invalid patents were outstanding.

Many of the fee patents erroneously so issued have since been canceled under authority of the act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205). Suits have been instituted against the counties refusing to refund the taxes paid by the Indians or refusing to cancel the delinquent tax assessments and tax sales to third parties. Judgments, aggregating approximately \$25,000, exclusive of costs, have been obtained against a number of counties.

Clearly the local authorities were not at fault for taxing these lands while such fee patents were outstanding. Whether reimbursement should not be made by the Federal Government to the counties involved for all judgments paid by them is a serious question of policy for determination by the Congress.

If H.R. 952 is to be given favorable consideration by the Congress, it is deemed proper to add that the text is identical with that of H.R. 10644 on which a report was submitted to your committee on June 8, 1938, and is identical with the text suggested by this Department in its report dated March 17, 1938, on H.R. 6393, Seventy-fifth Congress.

The Acting Director of the Bureau of the Budget has advised that this proposed legislation would not be in accord with the program of the President.

Sincerely yours,

HAROLD L. ICKES,
Secretary of the Interior.

GENERAL ACCOUNTING OFFICE,
Washington, March 21, 1939.

Hon. WILL ROGERS,
Chairman, Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. CHAIRMAN: Your letter of February 27, 1939, acknowledged February 28, requests a report on H.R. 952, entitled "A bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid."

The bill provides: "That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees and Indian heirs of allottees for all taxes paid on so much of their allotted lands as, having been patented in fee prior to the expiration of the period of trust, without application by or consent of the patentee, has been or may be restored to trust status through cancelation of the fee patent by the Secretary of the Interior: *Provided*, That in any case in which a claim against a State, county, or political subdivision thereof for taxes collected upon such lands while the patent in fee was outstanding has been reduced to judgment, and such judgment remains unsatisfied, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes, including penalties and interest, paid thereon, and upon payment by the State, county, or political subdivision thereof of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case in which such a claim has been reduced to judgment and such judgment has been satisfied, the Secretary of the Interior is authorized, upon proof of satisfaction thereof, to reimburse the State, county, or political sub-

division thereof, for the actual amount of the judgment, exclusive of the costs of litigation.

"SEC. 2. There is hereby authorized to be appropriated the sum of \$75,000 or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this Act.

"Any appropriations made pursuant to this section shall remain available until expended."

This Office has no information as to the merits of the proposed legislation and as to the bill does not contain anything affecting the jurisdiction or functions of this Office I have no suggestion or recommendation to make with respect thereto.

Sincerely yours,

R. N. ELLIOTT,
Acting Comptroller General of the United States.

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 6, 1939.

Hon. WILL ROGERS,
Chairman, Committee on Indian Affairs,
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: I desire to invite your attention to H.R. 952, which proposes to authorize the appropriation of \$75,000, or so much thereof as may be necessary, to reimburse Indian allottees and Indian heirs of allottees for all taxes paid on so much of their allotted lands as, having been patented in fee prior to the expiration of the period of trust, without application by or consent of the patentee, have been or may be restored to trust status through cancelation of the fee patent by

the Secretary of the Interior. In cases in which claims against States, counties, or other political subdivisions for taxes collected upon such lands have been reduced to judgment and such judgments are unsatisfied, the Secretary would be authorized to cause such judgments to be released upon payment of costs by the State or county. If any such judgment has been satisfied, the Secretary would be authorized to reimburse the State, county, or political subdivision for the actual amount of the judgment, exclusive of the costs of litigation.

The obvious purposes of this bill are to compensate Indian allottees for taxes erroneously collected from them and to relieve the political subdivision of States of the burden of making restitution in such cases. Whether either of these purposes would be accompanied by the enactment of the bill depends upon the decision to be rendered by the Supreme Court in the case of *Board of Com'rs of Jackson County, Kans. v. United States* (100 F.(2d) 929), now pending on writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. Review is being sought solely on the question of whether the lower court correctly awarded, as a part of the recovery allowed, interest on the amounts paid as taxes by the Indians. This is a question of importance on which a conflict now exists. (Cf. *Board of Com'rs of Tulsa County, Okla. v. United States* (C.C.A. 10), 94 F.(2d) 430, and *United States v. Nez Perce County, Idaho* (C.C.A. 9), 95 F.(2d) 232, 95 F.(2d) 235). For this reason the Government has not opposed the petition for writ of certiorari. The case will not be reached during the present term.

The reimbursement proposed by H.R. 952 merely covers the amounts actually paid by the Indians as taxes and does not include interest thereon. If the Supreme Court should hold in the *Jackson County* case that the court below erred in awarding interest, the bill in its present form would appear to be unobjectionable. On the other

hand, should the circuit court of appeals be upheld in the allowance of interest, the rights of the Indian allottees to be benefited by the bill would be substantially affected. In cases in which the claims for taxes paid have not been reduced to judgment, the reimbursement to be authorized would discharge the political subdivisions from the liability to refund the taxes, but it would not extinguish the liability for interest and would not adequately compensate the Indians. In cases in which the claims have been reduced to judgments which include interest, the release of the judgments would deprive the Indians of their right to the interest which was or should have been awarded in the suits instituted for their benefit. Furthermore, should the bill be passed and the judgment in the *Jackson County* case be released before that case has been heard by the Supreme Court, proceedings in that Court would, of course, be terminated, in which event the Indians there involved would lose the interest awarded by the lower court, and the question as to whether or not the political subdivisions are liable for interest in such cases would have to be determined in an entirely new suit.

For the foregoing reasons I recommend that no action be taken in respect to this legislation until the Supreme Court has heard and decided the *Jackson County* case.

The Director of the Budget informs me that the proposed legislation would not be in accord with the program of the President.

Sincerely,

FRANK MURPHY, *Attorney General*.

[Report on H.R. 10644, 75th Cong.]

DEPARTMENT OF THE INTERIOR,
Washington, June 8, 1938.

Hon. WILL ROGERS,
*Chairman, Committee on Indian Affairs,
House of Representatives.*

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on H.R. 10644, a bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for other purposes.

This proposed legislation would authorize the payment to Indian allottees or Indian heirs of deceased allottees for all taxes paid by them on so much of their allotted lands for which patents in fee were issued prior to the expiration of the trust period without application or consent of the patentee and which have been or may hereafter be restored to a trust status through cancellation of the patents in fee by the Secretary of the Interior.

Further, the bill would authorize the reimbursement to Indians by the Secretary of the Interior of the amount of taxes, including penalties and interest, in any case in which there is a claim against a State, county, or other political subdivision thereof for taxes collected upon such lands while the patent in fee was outstanding and where the claim had been reduced to judgment and remains unsatisfied, provided the State, county, or political subdivision paid the costs of the suit and caused the judgment to be released. In event a claim has been reduced to judgment and the judgment satisfied, the bill provides for reimbursement to the State, county, or political subdivision of the actual amount of the judgment exclusive of the costs of litigation.

Section 2 would authorize the appropriation of \$75,000, or so much thereof as may be necessary, to carry out the provisions of the act, said appropriation to remain available until expended.

The unfortunate situation confronting this Department, the Indians involved, and the various counties situated within most of those States having an Indian population may be attributed to an interpretation by this Department of the provisions of the act of May 8, 1906 (34 Stat. 182), which provides that the Secretary of the Interior may, whenever he shall be satisfied that any Indian allottee is capable of managing his or her own affairs, cause a patent in fee to be issued to such allottee. Under this authority it was at one time believed that no application for a patent in fee by the Indian allottee was required.

In the early part of 1917 this Department issued a "Declaration of policy in the administration of Indian affairs," pursuant to which patents in fee were issued to able-bodied adult Indians of less than one-half Indian blood, and also to those adult Indians of one-half or more Indian blood who were found competent upon investigation by competency commissions appointed for that purpose. This policy remained in force up to and including the year 1920. During this period approximately 10,000 patents in fee were issued to Indian allottees who came within the foregoing classification. Although applications were procured from a few of the Indian allottees, we are here concerned only with those cases where patents in fee were arbitrarily issued during the trust period without application by or consent to the patentee.

In the case of two Coeur d'Alene Indians, who, like many others, had refused to accept their patents, this Department canceled their patents and brought suits to test the validity of taxes levied upon their lands. The United States Circuit Court of Appeals, Ninth Circuit, in a decision rendered July 2, 1923, in these two cases

(*United States v. Benewah County* and *United States v. County of Kootenai, Idaho*, 290 Fed. 628), held that the Secretary of the Interior had no authority to issue a patent in fee to an Indian allottee during the trust period without an application therefor; that a patent so issued did not convey the legal title and that the Indian allotments involved in the suits were not subject to taxation by State authorities during the years the invalid patents were outstanding, as the right to exemption from taxation was vested and could only be divested by due process of law or on application of the allottee or with his consent.

In order to afford relief to those Indian allottees to whom patents in fee had been issued without their application or consent, the Secretary of the Interior was authorized by the act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205), on application by the allottee or his or her heirs, to cancel patents in fee issued during the trust period without application by or consent of the patentee, insofar as the patents covered lands remaining undisposed of and without encumbrances by the patentees or Indian heirs, provided such lands had not been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption had expired. Approximately 470 of the original 10,000 "forced" patents have been canceled under the authority contained in the acts referred to.

Upon cancelation of patents in fee county officials have been requested to remove the allotments from the tax assessment rolls, cancel any unpaid assessments, tax sales or tax deeds, and refund any taxes paid by the Indian allottees. Such requests have in some instances been complied with, but in the main have been refused, thus making it necessary to institute suits through the Depart-

ment of Justice to enforce the relief desired. Suits involving approximately 100 allotments have already been instituted and judgments obtained against various counties for refund of taxes in the aggregate sum of approximately \$25,000, exclusive of the costs of litigation.

The question of whether reimbursement should be made by the Federal Government to all counties involved for all judgments paid by them is, of course, fundamentally one for the consideration of Congress. Patents in fee having been recorded covering lands allotted to Indians the county authorities naturally felt they were entitled to assess and collect taxes thereon. Doubtless when requests were made for reimbursement of such taxes after the patents in fee were canceled and trust patents reinstated or reissued, the counties either did not have funds in their treasuries available for such payment or the county officials lacked legal authority to pay. Clearly the local authorities were not at fault for taxing such land while patents in fee were outstanding.

In a report submitted to the chairman of the Committee on Claims, House of Representatives, on March 17, 1938, on H.R. 6393, a bill for the relief of certain counties in the State of South Dakota for judgments against them because of patents in fee having been erroneously issued by the United States on certain trust lands, it was said that if that bill was to receive favorable consideration it should be amended so as to authorize reimbursement not only to the counties in South Dakota named in H.R. 6393 but also to the counties in other States for amounts they have been required to pay the Indians on account of taxes and penalties collected, but that the costs incurred by the counties in resisting tax adjustment suits should not be reimbursed.

The text of H.R. 10644 is identical with the text suggested by this Department in its report on H.R. 6393, in the event that bill received favorable consideration by

the Congress. The Acting Director of the Bureau of the Budget, however, in commenting upon the proposed Department report on H.R. 6393 advised "that the proposed legislation, either in its present form or if amended as you indicate, would not be in accord with the program of the President."

Sincerely yours,

E. K. BURLEW,
Acting Secretary of the Interior.

[Report on H.R. 6393, 75th Cong.]

DEPARTMENT OF THE INTERIOR,
Washington, March 17, 1932.

Hon. AMBROSE J. KENNEDY,
*Chairman, Committee on Claims,
House of Representatives.*

MY DEAR MR. CHAIRMAN: Further reference is made to your request for a report on H.R. 6393, a bill for the relief of certain counties in the State of South Dakota for judgments against them because of patents in fee having been erroneously issued by the United States on certain trust lands.

This legislation would authorize the payment of a total sum of \$19,443.23 to certain counties in South Dakota as reimbursement for judgments procured against them on or before December 31, 1936, for taxes collected on the allotments of various Sioux Indians to whom patents in fee were issued without their application or consent, prior to the expiration of the proposed trust, which patents were subsequently canceled by this Department. This sum also includes the costs of the various actions in law and equity for the recovery of taxes collected and injunctions restraining further assessment, levy or collection of taxes on the lands involved.

The unfortunate situation confronting this Department, the Indians involved, and the various counties situated within most of those States having an Indian population may be attributed directly to an erroneous interpretation by this Department of the provisions of the act of May 8, 1906 (34 Stat. 182), which provides that the Secretary of the Interior may, whenever he shall be satisfied that any Indian allottee is capable of managing his or her own affairs, cause a patent in fee to be issued to such allottee. Under this authority it was at one time believed that no application for a patent in fee by the Indian allottee was required.

In the early part of 1917 this Department issued a "Declaration of policy in the Administration of Indian Affairs," pursuant to which patents in fee were issued to able-bodied adult Indians of less than one-half Indian blood, and also to those adult Indians of one-half or more Indian blood who were found competent upon investigation by competency commissions for that purpose. This policy remained in force up to and including the year 1920. During this period approximately 10,000 patents in fee were issued to Indian allottees who came within the foregoing classification. Although applications were procured from a few of the Indian allottees, we are here concerned only with those cases from a few of the Indian allottees, we are here concerned only with those cases where patents in fee were arbitrarily issued during the trust period without application by or consent of the patentee.

In the case of two Coeur d'Alene Indians, who, like many others, had refused to accept their patents, this Department canceled their patents and brought suits to test the validity of taxes levied upon their lands. The United States Circuit Court of Appeals, Ninth Circuit, in a decision rendered July 2, 1923, in these two cases (*United States v. Benewah County* and *United States v. County of Kootenai, Idaho*, 290 Fed., 628), held that the

Secretary of the Interior had no authority to issue a patent in fee to an Indian allottee during the trust period without an application therefor; that a patent so issued did not convey the legal title and that the Indian allotments involved in the suits were not subject to taxation by State authorities during the years the invalid patents were outstanding, as the right to exemption from taxation was vested and could only be divested by due process of law or on application of the allottee or with his consent.

In order to afford relief to those Indian allottees to whom patents in fee had been issued without their application or consent, the Secretary of the Interior was authorized by the act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205), on application by the allottee or his or her heirs, to cancel patents in fee issued during the trust period without application by or consent of the patentees, insofar as the patents covered lands remaining undisposed of and without encumbrance by the patentees or Indian heirs, provided such lands had not been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption had expired. Approximately 470 of the original 10,000 "forced" patents have been canceled under the authority contained in the acts referred to.

Upon cancellation of patents in fee, county officials have been requested to remove the allotments from the tax-assessment rolls, cancel any unpaid assessments, tax sales or tax deeds, and refund any taxes paid by the Indian allottees. Such requests have in some instances been complied with, but in the main have been refused, thus making it necessary to institute suits through the Department of Justice to enforce the relief desired. Suits involving approximately 100 allotments have already been

instituted and judgments obtained against various counties for refund of taxes in the aggregate sum of approximately \$25,000 exclusive of the costs of the litigation.

The question of whether reimbursement should be made by the Federal Government to all counties involved for all judgments paid by them is, of course, fundamentally one for the consideration of Congress. Patents in fee having been recorded covering lands allotted to Indians the county authorities naturally felt they were entitled to assess and collect taxes thereon. Doubtless when requests were made for reimbursement of such taxes after the patents in fee were canceled and trust patents reinstated or reissued, the counties either did not have funds in their treasuries available for such payment or the county officials lacked legal authority to pay. Clearly the local authorities were not at fault for taxing such land while patents in fee were outstanding.

If this bill is to receive favorable consideration it should be amended so as to authorize reimbursement not only to the counties in South Dakota named in H.R. 6393 but also to the counties in other States for the amounts they have been required to pay the Indian on account of taxes and penalties collected. The costs incurred by the counties in resisting tax adjustment suits should not be reimbursed.

With particular reference to H.R. 6393, our records indicate that not all of the judgments for which it is proposed to reimburse the several counties named have as yet been paid. In similar cases elsewhere many of the judgments have been satisfied.

In order that the relief sought may be made generally applicable to all situations and that court action for the recovery of taxes be rendered unnecessary in future cases, and that reimbursement may be made direct to Indians who have paid taxes on lands of the class hereinabove referred to, the following amendments to H.R. 6393 would be required:

Change the title to read "A bill for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for other purposes," and strike out all after the enacting clause of the bill and substitute in lieu thereof the following:

"That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe Indian allottees and Indian heirs of allottees for all taxes paid on so much of their allotted lands as, having been patented in fee prior to the expiration of the period of trust, without application by or consent of the patentee, has been or may be restored to trust status through cancelation of the fee patent by the Secretary of the Interior: *Provided*, That in any case in which a claim against a State, county or political subdivision thereof for taxes collected upon such lands the patent in fee was outstanding has been reduced to judgment, and such judgment remains unsatisfied, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes, including penalties and interest, paid thereon, and upon payment by the State, county or political subdivisions thereof of the costs of the suit, to cause such judgment to be released: *Provided further*, That in any case in which such a claim has been reduced to judgment and such judgment has been satisfied, the Secretary of the Interior is authorized, upon proof of satisfaction thereof, to reimburse the State, county, or political subdivision thereof, for the actual amount of the judgment, exclusive of the costs of litigation.

"SEC. 2. There is hereby authorized to be appropriated the sum of \$75,000, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this Act.

"Any appropriations made pursuant to this section shall remain available until expended."

The \$75,000 authorized to be appropriated by the bill, as amended, would be sufficient to take care of all those cases in which judgments have been rendered and those now pending in the courts. It would also leave a balance to reimburse those Indians whose patents in fee may be canceled in future years.

The Acting Director of the Bureau of the Budget has advised, however, "that the proposed legislation, either in its present form or if amended as you indicate, would not be in accord with the program of the President."

Sincerely yours,

HAROLD L. ICKES,
Secretary of the Interior.

SENATE

76th Congress
3d Session

Report
No. 1488

RELIEF OF INDIANS WHO HAVE PAID TAXES
ON ALLOTTED LANDS

APRIL 24, 1940.—Ordered to be printed

Mr. BULOW, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany H.R. 952]

The Committee on Indian Affairs to whom was referred the bill (H.R. 952), providing for the relief of Indians who have paid taxes on allotted lands for which patents in fee were issued without application by or consent of the allottees and subsequently canceled, and for the reimbursement of public subdivisions by whom judgments for such claims have been paid, having had same under consideration, report thereon with the recommendation that it do pass without amendment.

This bill has been considered by the Committee on Indian Affairs of the House of Representatives; on May 22, 1939, that committee submitted its report (H.Rept. No. 669) to the House recommending its passage and on March 18, 1940, it passed the House.

A full explanation of the purpose of this proposed legislation is contained in said House Report No. 669, a copy of which is attached hereto and made a part of this report, as follows:

[Balance of Report same as H. Rep. No. 669, *supra*.]

EXCERPTS FROM THE ANNUAL REPORTS OF
THE SECRETARY OF THE INTERIOR, THE COM-
MISSIONER OF INDIAN AFFAIRS, AND THE
BOARD OF INDIAN COMMISSIONERS FOR THE
YEARS 1887-1931.

The primary responsibility for the administration of Indian affairs was transferred to the newly created Department of the Interior in 1849. Act of March 3, 1849, ch. 108, § 1, § 5, 9 Stat. 395 (1849) (repealed in part 1953) (superseded in part 1966) (formerly codified at 19 U.S.C. § 42 (1952) (scattered sections of 5 U.S.C. (1964)) (currently codified in sections of 5, 31, and 43 U.S.C. (1988)).

The Bureau of Indian Affairs was established as part of the Department of War by the Act of July 9, 1832, ch. 174, § 1, 4 Stat. 564 (1832) (codified as amended at 25 U.S.C. § 1 (1988)). Currently the Bureau of Indian Affairs continues to be responsible for the majority of federal duties to Indians.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 1st Sess. (1887).

Indians becoming individual freeholders.

The most important measure of legislation ever enacted in this country affecting our Indian affairs is the general allotment law of February 8, 1887. By this law every Indian, of whatever age may secure title to a farm, enjoy the protection and benefits of the law, both civil and criminal, of the State or Territory in which he may reside, and be subject to the restraints of those laws. It goes still further. Under it the Indian, in accepting the patent for his individual holding of land, takes with it the title to a higher estate, that of a citizen of the United States, entitled to all the privileges and immunities of such citizenship, and yet invested with all the lawful responsibilities of that position.

The statute is practically a general naturalization law for the American Indian, except that it is provided therein that its provisions shall not extend to the territory occupied by the Five Civilized Tribes and some other advanced communities of Indians. In every other respect the door has been opened through which every individual Indian by proper effort may pass from the savage life to the enjoyment of the fruits and privileges of civilization. The first effect of this law is to clear away the legal obstructions which have heretofore hindered the progress of many of the tribes. At 25-26.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 1st Sess. (1887).

When the Secretary of the Interior shall have approved the allotments made, then patents for such lands, recorded in the General Land Office, shall be issued to the respective allottees, declaring that the United States will hold said lands in trust for their sole use and benefit for twenty-five years, and at the end of that time will convey them, without charge, to said allottees or their heirs, in fee and free of all encumbrance; the President, however, may in his discretion extend the period beyond twenty-five years. At 3.

After receiving his patent every allottee shall have the benefit of and be subject to the civil and criminal law of the State or Territory in which he may reside; and no Territory shall deny any Indian equal protection of law; and every Indian born in the United States who has received an allotment under this or any other law or treaty, or who has taken up his residence separate from a tribe and adopted the habits of civilized life, is declared a citizen of the United States, but citizenship shall not impair any rights he may have in tribal property. At 4.

I fail to comprehend the full import of the allotment act if it was not the purpose of the Congress which passed it

and of the Executive whose signature made it a law ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship. Under this act it will be noticed that whenever a tribe of Indians or any member of a tribe accepts lands in severalty the allottee at once, ipso facto, becomes a citizen of the United States, endowed with all the civil and political privileges and subject to all the responsibilities and duties of any other citizen of the Republic. This should be a pleasing and encouraging prospect to all Indians who by experience or education have risen to a plane above that of absolute barbarism. The Indian is not unlike his white brother in moral and intellectual endowments and aspirations, he is proud of his manhood, and when he comes to understand the matter he will cheerfully and proudly accept the responsibilities which belong to civilized manhood. Within a very short time many Indians will be invested with American citizenship, including of course the sacred right of the elective franchise. In fact many Indians became citizens on the date of the passage of the law, for it provides that.

Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. At 6-7.

Annual Report of the Board of Indian Commissioners (1887).

The other matter needing the attention of Congress relates to the costs of conducting courts, and of public im-

provements in the Indian country. The lands allotted to the Indians are exempt from taxation for a period of twenty-five years. The Indian has all the rights and privileges of citizenship, but is exempt, in large measure, from the burdens of citizenship.

The country where he lives will be organized into counties and towns. Courts must be established, public buildings erected, roads opened, and bridges built. It can hardly be expected that the white citizens of these counties and towns will pay willingly the whole expense of these public services and improvements. It is not just to require the States and territories to assume this burden, hence, so long as Indian lands are exempted from taxation by the laws of the United States, provision should be made by the United States for re-imbursing to the States and Territories the amount which they will lose by such exemption. With these simple additions, we believe that the severalty act can be carried out with most beneficial results to the Indians and to our entire country. At 8.

PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE

Senator Dawes. Mr. Chairman, I hardly see the need of my occupying any portion of the time of this conference upon the matter under discussion to-night. The provision of the law seems to have been so fully comprehended and expounded already that it is not with any hope or any expectation that I shall make it any more clear to you than it now is, but merely that I shall not turn up missing whenever the subject is discussed. For a good many years the Mohonk conference and the friends of the Indian have believed that the Indian problem could never be solved until there was a law giving to the Indian land in severalty and citizenship, and last year we assembled here and the burden of our complaint was that we

could get no such law enacted. To-day the law confers upon every Indian in this land a homestead of his own; and if he will take it, it makes him a citizen, and opens to him the doors of all the courts in the land upon the same terms that it opens them to every other citizen, imposing upon him the obligations and extending to him the protection of all the laws, civil and criminal, of the State or Territory in which he resides. At 87.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 2nd Sess. (1888).

The long period of inalienability of the allotted land can not but secure the Indian from its loss through the wiles of bad men, and carry his estate to a more trusty posterity, while it seems to afford him, in the mean time, reasonable security that he shall not want for the necessities, at least, of life, and that it will increase his supply of comforts in proportion as he shall enlarge his capacity for dealing with it, and as thickening settlement increases both the value of his land and of its products. From such observation as I have been able to make, I give with cordiality my concurrence in this policy, and hope it may be pressed with diligence to a successful execution. At XXXI.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 2nd Sess. (1888).

There is a third class of persons who are heartily in favor of allotting Indian lands, but who are apprehensive that, under the flexible terms of the allotment act, allotments may be forced upon Indians before they are ready to receive, use, and hold them. An allotment unnecessarily delayed deprives an Indian of just so much opportunity for, or incentive to, progress; but an allotment made to an Indian before he has been made to understand its meaning and purpose takes away from its value

to him, and he may look upon it as a worthless or as an unwelcome thing imposed upon him. It is probable that such an Indian would not only neglect his land, but that he would finally abandon it and become a wanderer. Thus, it is said, that which was intended to be, and rightfully used would be, of benefit to the Indian, may be so used as to drive many of the race into vagabondage, and thus make them what may be called the gypsies of America.

But not withstanding the opposition of the two classes referred to, and of some of the Indian tribes, and the misgivings of a third class, there is no reason for the belief that the policy of making allotments of lands in severalty will be abandoned. At XXXVII-XXXIX.

Annual Report of the Board of Indian Commissioners (1888).

By the act of February 8, 1887, which has been well called the Indian emancipation act, land in severalty is now offered to all who are willing to accept it and prepared to care for it and improve it.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. (1889).

We should remember in this connection that the system of allotments of lands which has been carried on earnestly by the Government for a number of years is still being pursued vigorously, and that its great objects is to separate the allottee from his tribal relations, and put the older Indians upon lands they may use individually for their support.

Moreover, the allotment of lands is attended by citizenship for the Indian, and that citizenship ought to bring with it the privileges of the common schools of the white man in all its grades; thus whenever the Indian receiving his allotted land, cultivates it and has his family within the borders of any State where the white men have a common school system, the Indian should become

privileged to the use of that system of schooling the same as any one else; but of course this could not be affected without taxation of the Indian on his lands, or a substitute through payment by the Government itself of such taxes. At XLIX-L.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 50th Cong., 2nd Sess. (1889)

Since the publication of the last annual report the work of making allotments on the Winnebago Reservation, in Nebraska, and the Grande Ronde reservation, in Oregon, under the act of February 8, 1887 (24 Stat., 388), has been completed by Special Agents Fletcher and Collins, respectively. The schedules of the allotments on the first named reservation will be transmitted to the Department as soon as the necessary clerical work can be completed. Before acting upon the allotments at Grande Ronde it will be necessary to await the receipt of the plats and field-notes of cert in additional surveys made in the field. At 14.

Annual Report of the Board of Indian Commissioners (1889)

At a special business meeting of the Board, after a long and frank conversation with the Commissioner, it was voted: That this Board will earnestly aid the Commissioner of Indian Affairs in carrying out the plans, proposed by him for the education of Indians and their progress to full American citizenship. At 4.

Next to education in importance is giving to Indians homes and individual rights of property. This is being done under the general severalty act of February 8, 1887, as rapidly as the means provided and the condition of the several tribes will permit. During the last year 1,402 patents have been issued. All Indians are not yet ready to take allotments or sufficiently advanced to make good use of homesteads if granted to them. But we be-

lieve that a majority now desire to enjoy the benefits of the act, and others will, within a few years, be prepared for its application, when they see its stimulating effect upon profitable industry and its influence in promoting better habits of life. At 9.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 1st Sess. (1890).

Since the last annual report satisfactory progress has been made in work of allotting lands in severalty. At XXXV.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Sess. (1890).

Allotments

Allotment of Land in Severalty on Various Reservations.

As already stated, general authority for the allotment of lands in severalty to Indians located on any reservation created by law, treaty, or executive order, with exceptions noted, was conferred by the act of February 8, 1887 (24 Stats., 388). At XLIV.

Annual Report of the Board of Indian Commissioners (1890).

Allotments and Reduction of Reservations.

We see no reason to doubt the wisdom of the policy, now adopted as the settled policy of the Government, of giving to each Indian a separate holding of land, sufficient for his use and support, and then purchasing the surplus lands and throwing them open for settlement. Under the general severalty act of February 8, 1887, and in accordance with treaty stipulations, 15,607 allotments have already been made to tribes that were most advanced. At 9.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 2nd Sess. (1891).

The allotment law, commonly known as the Dawes bill, has secured for its author the praise of all interested in the welfare of the Indians. It has been accepted as the very best means of solving the Indian problem, and it is now, as has been pointed out in the earlier part of this report, receiving an administration, chiefly by written consent and agreement of the Indians, that promises to develop rapidly its benefits for allottees. At XXXV.

Efficient administration of what we have, it is believed, will be a source of much more benefit to the Indian than the multiplication of laws. Such administration is being given, and, as has been proven, with immense improvement of the Indian's condition in every way. But there are among the conclusions stated by the Commissioner one or two, without passing upon others, that are particularly noticeable. He remarks (p. 36), as to.

COMPULSORY EDUCATION OF CHILDREN OF ALLOTTEE CITIZENS

The General Government has the right, both for its own protection, for the promotion of the public welfare, and for the good of the Indians, not only to establish schools in which their children may be prepared for citizenship, but also to use whatever force may be necessary to secure to the Indian children the benefit of these institutions. Even in the cases where, by taking their lands in severalty, they are in process of becoming citizens, they are still in a state of quasi-independence, because the General Government withholds from them for twenty-five years the power of alienating their lands, while by exempting them from taxation for the same period it practically excludes their children from the public schools. For these reasons it would seem that the Government has not only the right, but is under obligation to make educational provisions. At XXVIII.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 51st Cong., 2nd Sess. (1891).

In compensation for his protection by the State in all these privileges and immunities, or such as he may be qualified to exercise, the Indian as a citizen will owe allegiance to the government of the State. Allegiance seems to be the term adopted to express in one word all the burdens and obligations of the citizens of a State or nation. Among these are those of obedience to the law of the State, contributing, as by payment of taxes, to its support and bearing arms in its defense when called upon to do so. At the same time, with the exception that their lands received under allotment laws will be exempt from taxation for a period of twenty-five years, and possibly longer, they will be subject to the burdens borne by other citizens, and must manage their own affairs. At 24-25.

Sixth. That the General Government has the right, both for its own protection, for the promotion of the public welfare, and for the good of the Indians, not only to establish schools in which their children may be prepared for citizenship, but also to use whatever force may be necessary to secure to the Indian children the benefit of these institutions. Even in the cases where, by taking their lands in severalty, they are in process of becoming citizens, they are still in a state of quasi-independence, because the General Government withholds from them for twenty-five years the power of alienating their lands, while by exempting them from taxation for the same period it practically excludes their children from the public schools. For these reasons it would seem that the Government has not only the right, but is under obligation to make educational provisions for them, and to secure to their children the benefits of those provisions. At 36-37.

The general allotment act provides that lands, when allotted, shall not be immediately conveyed to the allottees, but shall be held, in trust for a period of 25 years (which period may be indefinitely extended by the President), at the end of which it is to be conveyed to the allottee or his

heirs, in fee, discharged of the trust and free of all encumbrance. The allottee is thus secured in the possession of his home for at least 25 years, during which time the force of example, education, and contact with white civilization will, in a great degree, fit him for absolute and unconditioned ownership. Special acts have since been passed or agreements concluded under which allotments have been made or are to be made, but all of them contain substantially the same provision as to the trust period. At 41.

Annual Report of the Board of Indian Commissioners (1891).

Allotments and Patents.

The work of allotting lands in severalty to Indians and securing to them separate homesteads has been continued, and we see no reason to doubt the wisdom of the policy. During the year 2,104 patents have been issued and 2,830 allotments have been approved and the issuance of patents directed. Already more than 16,000 Indians have become citizens of the United States, and about 4,000 more, by taking allotments, are soon to become citizens. Adding the 7,610 in Oklahoma who have received allotments under agreements ratified by the last Congress, we have a total of 27,610 Indian American Citizens, subject to the same law and entitled to the same privileges as other citizens; and they have surrendered to the United States about 23,000,000 acres, which have become a part of the public domain and open for settlement and improvement. In their new position, not a little perplexing and bewildering, the Indians will still need kindly supervision and all the safeguards that law and humanity and instruction can throw around them. One thing especially needed to give full success to the allotment policy, which we have before urged, and to which, we see, with much satisfaction, the President has called attention in his late mes-

sage, is provision for public improvements in the counties where Indians hold a large part of the lands. They have white neighbors, and the number will increase rapidly, as the unallotted lands are sold. Indian homesteads are inalienable and untaxable for twenty-five years. The white settlers must pay all the taxes for the support of schools and for all public uses. In such circumstances it will hardly be possible to maintain a kindly feeling between the races. The Indian will be regarded as a burden and his children will not be welcomed into the public schools. Relief from such evils can be given by withholding from the proceeds of lands purchased from Indians, or by direct appropriation, of sufficient funds to pay the Indian pro rata share of the taxes, according to the value of the lands held by them. This would elevate the Indian to equality with his white neighbor and remove the hindrance to progress and development which seems now involved in the inalienable feature of the allotment policy. At 7.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 1st Sess. (1892).

The report of the Commissioner of Indian Affairs shows that since the date of his previous annual report patents have been issued and delivered to 1,303 Indians, as follows: 265 on Grande Ronde reservation, Oregon; 167 to Poneas in South Dakota; 109 to Iowa in Oklahoma Territory; 1 to a Miami Indian; 242 to Wyandottes; 157 to Ottawas and 68 to MODOES in the Indian Territory, and 284 to Papagoes on San Xavier reservation in Arizona. Also, that patents have been prepared, but not yet delivered to 5,245 Indians: 3,321 to Cheyennes and Arapahoes, 1,365 to the Citizen Band of Pottawatomies, and 561 to Absentee Shawnees, all in the Territory of Oklahoma and all under and in accordance with agreements with those Indians ratified by the Indian appropriation act of March 3, 1891. At XXXII.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 1st Sess. (1892).

The essential element of the policy adopted by the Government is suggested in the one phrase—American citizenship. What is Commonly known as the "Dawes bill," or the "land-in-severalty law," which received Executive sanction February 8, 1887, has radically fixed our method of dealing with the Indians. By its operation those who take their land in severalty become citizens of the United States, entitled to the protection of the courts and all other privileges of citizenship, and are amenable to the laws and under obligations for the performance of the same duties as devolve upon their fellow-citizens. At 6.

Annual Report of the Board of Indian Commissioners (1892).

Since the general allotment bill became a law, on the 8th of February, 1887, allotments in severalty have been made to 15,482 Indians, and of these about 9,600 have been completed during the last year. Adding those who, under other acts and treaties, have taken allotments, the whole number who have become citizens is more than 30,000, and about 50,000 others are now receiving, or will soon receive, allotments. At this rate of progress the work will be substantially completed in a few years, and nearly all Indians will become individual landowners and have the opportunity, at least, of making for themselves comfortable homes. At 1.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. (1893).

A fair examination of the work of this Bureau for the last fiscal year, furnishes proof in support of the wisdom of the policy which for the past few years has controlled the administration of Indian affairs. Slowly, but steadily, these wards of the nation are being advanced to a condition suited for citizenship. At XVI.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 52nd Cong., 2nd Sess. (1893).

With respect to this question Agent Patrick was instructed by this office April 20, 1893, that improvements of a permanent character made on allotments such as houses, fences, broken ground, etc., are a part of the realty; that while the allotments made to the Indians of his agency were so made in accordance with the provisions of agreements with the various tribes, they are held in trust by the United States for the use and benefit of the allottees for the period of twenty-five years, at the expiration of which period they are to be patented in fee to them discharged of the trust and free of all charges or encumbrances whatsoever. He was notified that in an opinion by the Attorney-General, dated July 27, 1888 919 Opinions, 161), it was held that lands allotted to Indians under various acts of Congress.—

are exempt from State or Territory taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority;

and that as improvements of a permanent character made on the allotments are a part of the lands it would follow under the Attorney-General's opinion that they are not taxable by the authorities of the Territory of Oklahoma. At 53.

Annual Report of the Board of Indian Commissioners. (1893).

They urged that Indians should be taught, as soon as possible, the advantage of individual ownership of property, and should be given land in severalty as soon as it

is desired by any of them, and that the tribal relations should be discouraged; that the titles be made inalienable from the family of the holder for at least two or three generations; that the civilized tribes in the Indian Territory should be taxed and made citizens of the United States as soon as possible. At 4.

Lands in Severalty.

As above stated, the commission, in their first report twenty-five years ago, recommended the policy of granting homesteads to Indians. As early as the year 1878 they made a draft of a bill to secure this end by legislation, and they continued to urge its adoption from year to year, until finally, in 1887, the general allotment act was passed by Congress. This has been well called the Indian emancipation act. It frees those who accept it from the shackles of the reservation system and makes them citizens of the United States, subject to law, and entitles them to equal rights with all other citizens. They have at least the opportunity to make for themselves permanent homes and to become self-supporting. Under this general act and general special acts, 24,190 allotments have been made and 13,625 patents have been issued. At 5-6.

PROCEEDINGS OF THE BOARD OF INDIAN COMMISSIONERS AT THE ELEVENTH LAKE MOHONK INDIAN CONFERENCE

Address of Senator Dawes

That is not all. The United States has put him upon 160 acres of land, and has declared that it will hold that land for him for twenty-five years free from all State taxes or any other charge whatever. And yet, if he is to be educated at all, unless the United States shall educate him, he must be educated by that State which, the United States says, shall not tax a dollar of his property to defray the expenses of his education. There are whole counties in some of these Western States to-day all made up of allotted

Indians and not a foot of their land can be taxed by those States. The State must apply, out of its treasury, their schoolhouses if they have them, their roads if they have them, their bridges if they have them, their courthouses if they have them. The State must maintain order among them if they have order. And the white people of the other counties of the State must pay for all these things. Therefore it is that, while the United States is forcing this process, there comes upon the Government a louder call for increased appropriation and more efficient work on its part to supply that which it has declared the state shall not do. It is in lieu of the taxation it has forbidden.

You must take the Indian by the hand and see it that he does not fall back into the stream. The Government must do it. You can not ask the State of Nebraska to take three counties of allotted Indians, not a foot of whose land can be taxed for twenty-five years for the support and civilization of those who live in these counties, you can not ask Nebraska, with any expectation that when will respond, to meet the needs of the Omaha Indians at this moment. Pretty soon the State will rebel against this idea of having all these allotted land exempt for twenty-five years from taxation; and the United States must meet it with an equivalent. The equivalent is to do for these Indians now, and in this matter, what the Government has put it out of the power of the State to do. At 60-61.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 2nd Sess. (1894).

I do not question the advisability of allotting land to Indians in severalty, but I do most seriously question the propriety of this course before the Indians have progressed sufficiently to utilize the land when taken. The allotments should be made to the Indians in severalty for

the good of the Indians, for the advancement of the Indians, not for the purpose of obtaining land connected with the Indian reservation to satisfy the insatiable desire of border men, who obtain it frequently not for homes, but for speculation. At III.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 2nd Sess. (1894).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1894).

One evil, and we earnestly called attention to it immediately after the enactment of the general allotment law in 1887, is thrown upon white residents in the near vicinity of such lands. The Indian enjoys the privileges of citizenship, but is exempt from its duties. The county where he lives is organized into counties and towns. Courts, public buildings, schools, roads, and bridges must be maintained. It can hardly be expected that the white citizens will pay willingly all those expenses, nor is it just to require it. Provision should be made for reimbursing to the States the amount which they lose by the exemption of Indian lands from taxation. To secure this result an act passed the Senate February 6, 1893, but it failed to pass the House. A similar act was introduced at the first session of the present Congress, but has not yet become a law. We hope the subject may receive early attention. At 6.

Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 3rd Sess. (1895).

There are a number of changes that should be made in the present allotment system which require Congressional action. According to the present law an Indian becomes a citizen of the United States upon receiving his allot-

ment; he is frequently ready to receive land before he is prepared for the consequences of citizenship.

Allotments should really be made long before the reservations are opened, and each Indian should be settled upon his homestead and should be self-supporting before citizenship is conferred upon him. Indeed, when citizenship is conferred upon him the Government ought to let him alone and leave him to take his place, surrounding him then with no more restraint and giving him no more help that is accorded to other citizens. At IX.

Annual Report of the Board of Indian Commissioners (1895).

But the sale of allotted lands should not be allowed under any circumstances. The act of August 15, 1894, granting to the citizen Pottawatomie and and Western Shawnee Indians the right to sell and convey portions of their allotments, has inflicted great loss and injury upon those Indians and inured to the benefit only of land sharks and speculators. We earnestly recommend that the law be repealed and that no more legislation of that kind be enacted. The promise contained in the patents issued to allottees should be sacredly kept, and the lands allotted held for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom the allotments have been made. This wise and beneficial purpose of the general allotment act to protect the Indians in the possession of their homesteads should not be annulled and frittered away by specific legislation. The disastrous results of the first experiment in this direction ought to be a sufficient warning against any repetition of the act. At 8.

PROCEEDINGS OF THE BOARD OF INDIAN COMMISSIONERS AT THE THIRTEENTH MOHONK INDIAN CONFERENCE.

Another obstacle has been attended to by Dr. Riggs; and that is, when the lands are not taxable for twenty-

five years, and, while they are made citizens and entitled to the protection of the courts, with a right to sue and to have school privileges, these things have been denied them by their fellow-citizens. They have said, "We can not give you court privileges of schooling, for the reason that we get no taxes from you." The law is ample to protect them in this regard; but it takes an extraordinary effort to secure these rights and privileges, because public sentiment is in opposition to the law. This might be remedied by legislation. Where lands are allotted to a tribe of Indians, and there are surplus lands to be sold, have the money arising from the sale placed in the treasury, and such portion of it taken and paid to the municipalities as would be equivalent to the money that would have been raised by taxation. At 37.

THE SEVERALTY LAW

Now, what is the matter with the law? Is it not enough to say to any Indians, You may have 160 acres of land for your home? The Government shall hold for you the title to it for twenty-five years. It will convenient to hold it for you and for your use, and for nobody's else use, and no contract that you can make, no tax that any locality can impose upon it, no lease, mortgagee, or lien whatever during that twenty-five years shall have the slightest effect on it. Is not that enough? We all like the Dutchmen at Manhattan in the olden time. When they saw English war ships sailing up the bay they met in council and solemnly resolved that the English ought to be, and the same hereby are, conquered, and then went off and lighted their pipes and folded their arms. That is what we did. Now, what is the matter with this severalty law: It has been fallen among thieves, and there have not been enough good Samaritans around to take care of it. Why do I say that it has fallen among thieves? It was necessary to put into that law this clause: That, after allotments shall be made upon the reserva-

tion the Government is hereby authorized to sell what shall be left of these reservations. The men who buy land of the Indians, just as the Commissioner showed you, saw at once their opportunity. If you can get the Indian set out in severalty, the white men will get the rest of it, and they will not have anything to do but see to it that the rest of it is the best part of the reservation. At 40-41.

Report of the Commisioner of Indian Affairs to the Secretary of the Interior, H.R. Exec. Doc. No. 1, 53rd Cong., 3rd Sess. (1895).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 1st Sess. (1896).

Allotments are in progress on the Klamath, Rosebud, and Shoshone reservations, but have been suspended on the Hoopa Valley, Mission, and Lower Brule reservations for further surveys; 606 allotments to nonreservation Indians have been approved by the Department, and 181 new allotment applications are under consideration. At XLII

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 2nd Sess. (1896).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 54th Cong., 1st Sess. (1897).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 3rd Sess. (1897).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 55 Cong., 2nd Sess. (1898).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 3rd Sess. (1898).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 55th Cong., 3rd Sess. (1899).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners. (1899).

Department of the Interior. Board of Indian Commissioners, Washington, D.C., April 5, 1898.

United States Indian Agent:

We have been requested to report the results of the policy of allotting lands in severalty to Indians. To do this intelligently and accurately we need information from agents who are on the ground and familiar with the facts.

Please, favor us with replies to the following questions:

1. How many allotments have been made to the Indians of your agency?
2. How many patents have been issued?
3. How many Indians are living on their allotted lands?
4. To what extent are they cultivating their lands?
5. To what extent are their lands leased and with what results?
6. What in your opinion are the benefits or the evil of the allotment policy?

By replying, when convenient, and making such suggestions as you may deem fit, you will greatly oblige.

Yours respectfully. E. Whittlesey, Secretary.

Replies have been received from twenty agents, covering about 25,000 allotments and patents. These letters we publish with this report, and they will be read with interest, as they give the opinions and conclusions of intelligent and competent men on the ground.

REPLIES FROM INDIAN AGENTS ON RESERVATIONS WHERE ALLOTMENTS HAVE BEEN MADE.

Crow Creek Indian Agency
Crow Creek, S. Dak., May 2, 1898.

Mr. E. Whittlesey

Secretary Board of Indian Commissioners, Washington, D.C.

Sir: Replying to your letter of April 5, 1898, in which you ask for information as to the results of the policy of allotting land in severalty to Indians, would say—

1. That there have been 879 allotments made to the Indians of this agency.
2. That there have been 199 patents issued.
3. That all the Indians that have been allotted are living upon their allotments.
4. That they are cultivating their lands to a small extent for the reason that crops are almost a sure failure by reason of the repeated droughts.
5. That there are none of the lands leased.
6. That, in my opinion, the allotment plan is disadvantageous in many respects, more especially in a country like this where agriculture is almost a failure. I would not like to discourage this plan here now for the reason

that the Indians have all taken their allotments and are living upon them. But if these people could have been given a sufficient number of cattle to start a common herd among them and the reservation fenced, I think they would have been in much better condition now than they are by trying to till the soil and graze whatever of stock they have upon their own lands. This is preeminently a stock country, and I think this industry will be the one that will eventually make these Indians self-supporting. They have been averse to taking their patents for the reason that they think they will become citizens then and will have to pay taxes and be amenable to allow the laws of the white man. At 12.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 1st Sess. (1900).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 1st Sess. (1900).

The attention of this office has, at various times, been called to the unsatisfactory manner in which the personal estates of deceased Indians and of minor Indian wards are managed; it being reported that in many cases the administrators and guardians are irresponsible and their sureties worthless, so that the proper heirs and the Indian wards get very little or no benefit from what is rightfully due them. Section 6 of the general allotment act of February 8, 1887 (24 Stats., p. 388), provides that all Indians who have received allotments are entitled to the rights of citizenship, and shall have the benefit of and be subject to the laws of the State or Territory in which they reside. At 37.

PAPERS ACCOMPANYING REPORT OF COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF AGENT FOR SAC AND FOX AGENCY

Indians—The Sac and Fox Indians were allotted 160 acres of land per capita in 1891, 80 acres of each allotment to be held in trust by the Government for a period of twenty-five year exempt from taxation, the remaining 80 acres to be held in trust for a period of five years exempt from taxation, with the privilege of a longer term at the request of the tribe and the approval of the President of the United States. In accordance with the above clause, the five years trust period was extended to fifteen years, thus barring sale or taxation until the year 1906. At 304.

Annual Report of the Board of Indian Commissioners (1900).

Need of action in this matter is still further emphasized by the fact that the estate of a deceased allottee can not be probated and settled under State and Territorial laws: for the real estate of such a deceased Indian can not be sold to meet his debts, or for the partition of his estate among the heirs; because his land is held for twenty-five years after allotment, under a protected title which renders sale impossible. In the ordinary course of nature, of the adults who receive allotments on any reservation an entire generation of adult allottees will have died before patents in fee simple are given by the Government. as things now are it is practicably impossible to determine and to preserve a record of the heirs of such allottees who would be entitled to receive the patent in fee simple, at the expiration of twenty-five years after the allotment. At 16.

(2) Establish at each agency (and the county courts of counties where allotted Indians are to reside) a system of permanent records of all marriages, births, and deaths

of Indians who now hold, or who are likely to hold, allotted lands under the "protected title of twenty-five years." At 21.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 2nd Sess. (1901).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 56th Cong., 2nd Sess. (1901).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1901).

The great significance of the general allotment act, known as the Dawes bill, and enacted in February, 1887, lies in the fact that this law is a mighty pulverizing engine for breaking up the tribal mass. It has nothing to say to the tribe. It acts directly upon the family and the individual. Through a homestead it seeks to develop personality and regard for the family in the individual. By making every Indian who comes under its provisions a citizen of the United States it seeks to put a new allegiance and loyalty to our Government in place of the old allegiance to the Indian tribe. At 7.

PROCEEDINGS OF THE BOARD OF INDIAN COMMISSIONERS AT THE EIGHTEENTH LAKE MOHONK INDIAN CONFERENCE

The General Allotment Act Recognizes the Individual and the Family.

Such was the condition of Indians on the reservation, and such the status of the Indian before the laws of the United States, until the Dawes bill, the general

allotment act, became a law in 1887. With the provisions of this law you are all familiar. It is of the greatest value in and for itself, by reason of the result which it immediately accomplishes in securing to Indians land for their homes, and in settling them upon these lands. It gives to each Indian a title to his allotment, protected and inalienable for the first twenty-five years; and upon the expiration of that period it gives him a patent in fee simple. But it does more than this. It makes him a citizen of the United States, Protected by, and subject to, the laws of the State or Territory in which his land lies, from the day on which he takes his allotment. At 29.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 57th Cong., 2nd Sess. (1902).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. 5, 57th Cong., 2nd Sess. (1902).

Under this act all the lands that have been allotted in severalty to Indians may after their death be sold and conveyed by their heirs. This removes the restrictions hitherto existing as to the alienation of these lands, except such of them as are held as homesteads and those held by the Five Civilized Tribes, the later exception being based upon a decision of the Department rendered August 11, 1902. These inherited lands are now held in trust by the United States, but the approval by the Secretary of the interior of such conveyances as may be made under this law is the final administration of the trust, and the purchaser takes a fee-simple title, clear, free, and unencumbered. The lands then become subject to taxation under the laws of the State or Territory in which they are situated. At 65.

Annual Report of the Board of Indian Commissioners (1902).

The aim of President Grant in organizing this Commission, and of Congress, as expressed in the law which established it, was to "promote civilization among said Indians, bring them, where practicable, upon reservations, relieve their necessities, and encourage their efforts at self-support." And in the regulations issued by the President, June 3, 1869, defining in outline the duties of the Board, the sixth paragraph contained this provision:

The Commission will, at their Board meetings, determine upon the recommendations to be made as to the plans of civilizing or dealing with the Indians.

After a year of experience and observation, in their first report the Board (in addition to the reforms above referred to which introduced strict business methods into the purchase and inspection of goods), urged that Indians should be taught as soon as possible the advantage of individual ownership of property, and should be given land in severalty as soon as it was desired by any of them; that the tribal relation should be discouraged; that the titles to individual holdings of land should be made inalienable from the family of the holder for at least two or three generations. The general allotment act began the process of setting Indians free from the reservation system. The reception of an allotment of land to which the title is by law protected from alienation or taxation for twenty-five years makes the allottee a citizen of the United States and subject to the laws of the State of Territory where he resides. Through this act the opportunity to make for themselves permanent homes and to become self-supporting has been opened to the Indians, and under this act, and general and special acts following its principles, over 70,000 allotments have been made, and 70,000 Indians have been made citizens, have been brought under the protection of law, and introduced to the civilizing influences of American Life.

During these last months this Board, through its secretary, has been engaged in correspondence with all the Indians agents and school superintendents who act as agents, to secure statistics as to the condition of allotted Indians; the amount of allotted land on which Indians reside which is under cultivation; the establishment of family life with proper regard for marriage laws; the full registration of family relationships, and of births and deaths, at each agency; and in general as to the progress of the Indians in self-support and toward civilization and active participation in the local and political life of our country.

While some discouraging features are to be noted in connection with the operation of this act, and while difficulties as to the inheritance and the sale of allotments belonging to deceased allottees, which were foretold in earlier reports of this Board, have proved serious at some centers, there is upon the whole a very gratifying progress manifest in the fifteen years since the passage of the general allotment act. At 5, 7.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 2nd Sess. (1903).

The Secretary of the Interior gave only general comments as to the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 3rd Sess. (1903).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1903).

To Support Schools and courts, some equivalent should be promptly provided to take the place of the taxation from which Indian allotted lands are by the severalty act exempt for twenty-five years.

We wish to commit to the careful consideration of Congress and of the Department of the Interior the pressing question of means to support courts and schools and to open up and keep in repair highways and bridges in counties where most or all the land is allotted to Indians and is exempt from taxation under the United States trust patent given in accordance with the general allotment act of 1887. There seems to be no doubt that for the majority of the Indians to whom land has so far been allotted the provision of a trust patent making the land inalienable for twenty-five years and protecting it from liens of any kind, has been upon the whole a wise and helpful measure for the Indians. Exemption from taxation seemed a wise and necessary provision in carrying out this general scheme of allotment. Otherwise it was to be expected that Indians who had not been instructed in agriculture or accustomed to labor upon the land, when they began to live upon their allotted land would be unable to pay taxes, and in many cases they would default in the payment of assessed taxes so frequently that the result would be the loss of their lands through the operation of the tax law. There are now many of the younger Indians who have been educated in schools and taught to labor, who are quite as competent to bear the burden of taxation upon their allotted lands as are whites. Nevertheless, none who are close observers of Indian affairs can doubt that exemption from taxation has been upon the whole the best thing for the Indians who have thus far received allotments. The keen greed for land on the part of eager and often unscrupulous white men would have deprived most of the allottees of their holdings had the land not been protected by this trust patent. But where the larger part of the land of a county is thus exempt from taxation, the white settlers who are taxed for the support of the local courts, the schools, and the highways, as well as for the care of paupers and the insane, must of necessity feel their burden an exceptionally heavy one. And it is perfectly natural that the

objection on the part of the white taxpayers to increasing the burden of taxation which they already bear should make them very slow to admit Indians to the full protection of the courts and the law. Such white taxpayers say, not without reason, that it is not fair to have the machinery of their courts used and bills of expense to the county incurred to protect the person or the property rights of Indians who do not themselves pay any part of the cost of such courts. Allotted Indians often fail to get justice done them because of motives of economy on the part of white taxpayers, who keep the Indians out of the courts because they themselves feel wronged by the undue load of taxation which the exemption of Indian lands throws upon the whites in the support of courts and in the extension and improvements of the public highways, the maintenance of schools, and the care of paupers and of the insane. As a Board we have long been convinced that legislation ought to provide for the payment of a fair proportionate share of such expenses; the amount to be as nearly as possible equivalent to that which would accrue from the taxation of these protected Indian lands. Protection by the local courts is a condition necessary to the development of family life for these Indians; and experience in the right use of these courts as well as a share in roadmaking and in the care of the paupers and the insane, is essential to the right training of these Indian citizens to habits of independence, self-support, and true Americanism. At 9-10.

CAN TRIBAL FUNDS BE USED FOR THIS PURPOSE?

We have suggested in past years the need of legislation to make good in State and local governments the lack of those funds for school, courts, highways, etc., which would accrue from the taxation of lands now not taxed because allotted to Indians. We believe that money for this purpose should be provided by the United States Government. Can this be done equitably by using for

this purpose in certain instances a portion of the tribal funds under the custody of the United States Government, to offset the exemption of these lands from taxation? And is not practicable to devise a plan by which, when reservations are broken up by the allotment of land in severalty to Indians, from the sale of the excess of the land not needed for allotments a portion of the proceeds shall by law be devoted to the offsetting of such exemption of Indian lands from taxation? At 11.

It seems to us that there be need be no hesitation about breaking up tribal funds, except where it may seem wise to reserve a portion of such funds to be applied to school purposes, road making, and the support of courts, in counties where allotted Indians are thickly settled, during the twenty-five years of protected title for Indian allotments. At 12.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 58th Cong., 3rd Sess. (1904).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of Interior, H.R. Doc. No. 5, 58th Cong., 3rd Sess. (1904).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1904).

CAN PROVISION BE MADE BY GENERAL LAW FOR THE PAYMENT FROM UNDIVIDED TRIBAL FUNDS OF AN EQUIVALENT TO STATES, COUNTIES, AND TOWNS FOR THAT TAXATION FOR THE SUPPORT OF COURTS, SCHOOLS, ROADS, AND POOR RATES, FROM WHICH INDIAN ALLOTTED LANDS ARE FOR A TERM OF YEARS EXEMPTED? At 8.

Report of the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 1st Sess. (1905).

The Secretary of the Interior gave only general comments on the progress of allotments.

Report of the Commissioner of Indian Affairs to the Secretary of the Interior, H.R. Doc. No. 5, 59th Cong., 1st Sess. (1905).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1905).

[W]hether the allotted Indians, through the period of twenty-five years for which United States holds his land nontaxable and inalienable . . .

Annual Report of the Secretary of the Interior, Vol. 1 (1906).

This act [Burke Act] materially modifies the general allotment act of February 8, 1887, and provides, among other things, that until the issuance of fee-simple patents, all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States. It also confers authority on the Secretary of the Interior, in his discretion, to terminate the trust period by issuing a patent in fee simple whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs. At 49.

In connection with the taxation and care of these, the Commissioner refers to a decision of Judge Munger, of the circuit court of Nebraska, in which it was held that funds derived from the sale of inherited lands were taxable the same as the property of any ordinary citizen. On appeal to the United States circuit court of appeals, eighth circuit, at its December term in 1905, a decision was rendered of which the following is a syllabus:

1. *Indian lands—State taxation—Allotments exempt from taxation while inalienable.*—Lands allotted to

Indians, inalienable for certain periods of time during which they are held in trust by the United States for the benefit of allottees and their heirs . . . are exempt from taxation by any States or county during the period of trust . . . At 66.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1906).

"THE BURKE LAW"

By its provisions the lands allotted in severalty were to be held in trust for twenty-five years, and the Indians were to become citizens of the United States and of the several States at the instant of approval of their allotments. At 27.

Annual Report of the Board of Indian Commissioners (1906).

[T]he Burke law, by which Indians allotted after May 8, 1906, do not become citizens by virtue of allotment until after the expiration of twenty-five years, the period covered by the protected title to their lands—the trust deed from the United States which keeps Indian allotments inalienable and untaxed for that length of time.

Most of all we deprecate the change because it involves the perpetuation for from twenty to fifty years longer of a distinct class of "Indians untaxed and not citizens," . . .

[T]he wise statesmanship of Senator Dawes and others who framed and carried into effect the Dawes Act of February, 1887, proposed to train Indians for citizenship by intrusting them at once, on allotment, with the duties and the conscious responsibilities of active, local citizenship, and with the manhood stimulating right of suffrage, while the homestead was made inalienable and was freed from taxation by the United States trust deed for twenty-five years. At 8.

The central idea of the "Dawes bill," known as the "general allotment act of 1887," is that the allotment of lands in severalty shall make a United States citizen of the Indian who is thus separated from a tribal life and established on his own land. To save him from the land grabbers and give him a start in industry the United States protects him in the possession of his land by giving him a trust deed making the land inalienable and nontaxable for a period of twenty-five years from the time of the allotment. At 17-18.

Annual Report of the Secretary of the Interior Vol. 1 (1907).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1907).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1908).

Patents in fee are being given to Indians whenever in individual case it is shown that the Indian is capable of caring for his own property.

Every competent Indian should receive his patent in fee and assume the full obligations of citizenship, and the department endeavors to prevent any Indian from shirking this responsibility. At 19.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1908).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1908).

Twenty-two years have passed since the enactment of the general severalty act, familiarly known as the "Dawes bill." Under the provisions of that act more than 70,000 allotments have been made to individual Indians, each allotment subject to a trust patent by which the United States bound itself to hold the land nontaxable, inalienable and not liable to liens of any kind for twenty-five years, in the interest of the Indian to whom it was allotted, and at the expiration of that period of protected title to give to the allotted Indian or his heirs a patent and deed putting him in possession of the allotment in fee simple and free of incumbrance. At 8.

About one-half of those who are now members of this Board were commissioned by the President of the United States before the passage of the general severalty act of 1887. At 10. Bound by agreements and law to preserve for twenty-five years, inalienable and untaxed, the allotments made to Indians, and then to give to each owner a clear title in fee simple to his allotment, the Government should by law make such provisions that its guardianship in trusts of Indian allotments, will not work injustice to white citizens who have settled on land of their own near these protected Indian allotments. At 23-24.

Annual Report of the Secretary of the Interior Vol. 1 (1909).

Allotments.—It has been expected, by the allotment of lands to the Indians in severalty, to largely solve the Indian problem, the theory being that when an Indian received his allotment he would make his home on it, and become a self-supporting citizen. In a measure this result has been attained and the allottee eliminated from further consideration. At 25.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1909).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1909).

REMOVALS OF RESTRICTIONS

Occupying the position of guardian toward its Indian wards, the United States Government has undertaken to protect Indians in the possession of land allotted to them. It gives to allotted Indians "trust patents" which enable them to hold their allotments untaxed and inalienable for twenty-five years. Under the general severalty act allotments made Indians citizens. Under the Burke Act (in effect since May, 1906) allotment does not make Indians citizens; but the trust patents given enable Indians to hold their lands nontaxable and inalienable until the Secretary of the Interior shall decide that an Indian is competent to manage his own land; then the Indian, upon his requesting it, receives a deed in fee simple, and by virtue of that deed becomes a citizen of the United States. At 6.

NONTAXABLE INDIAN LANDS

The protected title of an allotted Indian makes that land for a long period non-taxable. . . .

[P]rovision equal to the amount which upon the average would be received by taxes from Indian allotted lands now nontaxable . . . At 23.

Annual Report of the Secretary of the Interior Vol. 1 (1910).

It has long been apparent that the tribal relations of the Indian must vanish and that he must ultimately take on the responsibilities and obligations of citizenship and so far as possible adapt himself to that course of life to which every individual must yield. At 32.

It is the policy of the Indian Service to grant citizenship or remove the restrictions from the Indian only when he has satisfactorily shown that he is capable in a reasonable degree of managing his own affairs, and where he

possesses an allotment of land to limit his right of alienation so as to require retention of a specific portion thereof as a homestead. There should be no hesitancy on the part of the Government in granting citizenship to the Indian where he shows himself to be qualified. On the contrary, to withhold citizenship tends to discourage the development of the very element of character in him in which the Government is undertaking to stimulate, and if the citizenship is granted to the Indian, he should be held to the same obligations of amenity to social, political, moral, and legal restrictions and obligations as any other citizen, and the Government should no longer undertake to exercise tutelage over him. At 33.

Annual Report of the Secretary of the Interior Vol. 1 (1911).

The Indians in the United States number slightly more than 323,000, of whom about one-third are members of the Five Civilized Tribes in Oklahoma. All are in the process of absorption with the general mass of American citizenship. When the process is complete with respect to any individual Indian he will have lost his tribal status, received in severalty his share of the tribal property, and been freed of all restrictions in dealing with it. He then has the same status as any other citizen and the guardianship of the Federal Government over him is at an end.

The Indian Service is engaged in the work of helping the Indians to fit themselves for American citizenship and in preserving and developing their property until they are able to take full charge of it. This work calls for administrative business ability, knowledge of practical sociological movements, and effective sympathy. The personal interests under the care of the service are of the greatest importance and are mainly concerned with three subjects—health and morals, industrial training, and general education. The property interests involved are of great value and complexity, including lands allotted to

the Indians in severalty and held by them under restrictions which in effect make the Government the guardian of the Indian. At 37-38.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1911).

As an incident a patentee in fee becomes a citizen. By operation of the Dawes Act of February 8, 1887 (24 Stat. L., 388), Indians who received trust patents became citizens; in this way 65,000 Indians attained citizenship before the act was amended by the act of May 8, 1906. Under the act of 1906, by which citizenship accompanies only a patent in fee, at least 400 Indians have become citizens. As all members of the Five Civilized Tribes were made citizens by the Congress, the whole number of citizen Indians is now over 166,000. As yet the possession of citizenship is a potential asset only to most of the Indians; few of them vote or take other part in the affairs of their communities. Nevertheless, their citizenship and taxation, so far as they have taxable property, have enabled the office to take a stand for the admission of their children into public schools, and ultimately will undoubtedly bring nearer the time when the Indians may become in fact citizens of the various States. At 23.

Annual Report of the Secretary of the Interior Vol. 1 (1912).

TAXATION OF INDIAN LANDS

The local white communities on or near Indian lands frequently have justifiable grounds for complaint in the fact that these lands are withheld from development and from taxation. This frequently encourages local sentiment which condones unfair or even illegal methods of separating the Indian from the ownership of such property, and while it furnishes a potent reason why the enforcement of Indian rights frequently can not safely be intrusted to local officials, it makes it all the more imperative that the Indian lands should be opened to general development and especially to local taxation as rapidly as

practicable. In this connection it has been found that Indians who are competent to receive patents in fee often do not apply for these patents because they desire to avoid subjecting their lands to taxation until a sale has actually been made. The applications for patents have been found in most cases to be connected with contracts of sale already made. To cure this abuse steps are being taken to issue patents without request to Indians who should have applied for them. Instructions have recently been issued to superintendents to report all cases of competent Indians who should have patents in fee and have failed to apply for the same. At 53.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1912)

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1912)

The policy of the Government with regard to the allotment of Indian lands has been in general so successful that occasional failures should not be considered a reason for any marked change. It seems to us, however, that the present is a time when particular attention must be paid to the protection of the Indian's property. Twenty-five years have passed since the general allotment act went into effect and on lands allotted under that act the period of protected title will soon begin to expire. Undoubtedly it will find some Indian owners who are not competent to manage their affairs, and as the time approaches for the expiration of protected title on their allotments the question of extending such protection becomes important. At 12-13.

Annual Report of the Secretary of the Interior Vol. 1 (1913).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1913).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1914).

The way out is gradually and wisely to put the Indian out. Our goal is the free Indian. The orphan-asylum idea must be killed in the mind of Indian and white man. The Indian should know that he is upon the road to enjoy or suffer full capacity. He is to have his opportunity as a "forward-looking man." This is not my dictum, for the Government has been feeling its way toward this policy for nearly 40 years. This is the rationale of the whole of our later congressional policy, of the liberality of Congress toward the education of the Indian, of the allotment system, of limitations fixed upon disposition of property. If the course of Congress means aught it means that the Indian shall not become a fixture as a ward.

It is the judgement of those who know the Indian best, and it is my conclusion after as intimate a study as practicable of his nature and needs, that we should henceforth make a positive and systematic upon as increasing number of the Indians of all tribes. I find that there is a statute which significantly empowers the Secretary of the Interior to do this in individual cases. That authority is adequate. And as soon as the machinery of administration can be set in motion I intend to use such authority. If year by year a few from each of the tribes can be made to stand altogether upon their own feet, we will be adding to the dignity of the Indian race and to their value as citizens. To be master of himself, to be given his chance—this is the Indian's right when he has proven himself. And all that we should do is to help him to make ready for that day of self-ownership. At 6-7.

There are many thousand Indians in our charge who are entirely self-supporting, capable, thrifty, farsighted, sensible men. And singularly enough these are most often found among those tribes which were most savage and ruthless in making war upon the whites. Some of these are indeed so farsighted that they do not then become subject to taxation. At 9.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1914).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1914).

Indian land which has heretofore been free from taxation, should contribute its share to the support of those functions of the State government from which the Indian owners derive benefit. Where treaty agreements obligate the Government to maintain the land free from taxation during a trust period of 25 years, or any other period, we believe a method should be devised by which the Federal Government should pay the proportionate share of such taxes. At 8.

Annual Report of the Secretary of the Interior Vol. 1 (1915).

Distinction between Indian citizen and white citizen.—The distinction between the Indian citizen and the white citizen lies mainly in the exercise of the function of governmental supervision. That some Indians, both citizen and noncitizen, are as fully qualified to manage their own affairs as the average white citizen, is patent to everyone claiming the least knowledge of Indian matters. For the purpose of determining what Indians belong to the competent class, and thereby entitled to assume full control of their property freed from governmental supervision, a commission has been created and has been instructed to

proceed with the examination of Indians who possess the necessary qualifications to entitle them to the unrestricted use of their moneys and properties entirely free from governmental control. When this commission shall have reported, it is then proposed to separate those so qualified from governmental control through the issuance to them of patents in fee for all lands now held in trust for them by the Government, and to transfer to them all funds to which they are entitled, and finally sever the bonds which now hold them as Government wards, either upon application of the individual Indian or by departmental authority, as shall hereafter be decided upon. At 57.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1915).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1916).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1916).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1917).

Declaration of policy.—A new and far-reaching policy has been declared in the interest of the competent Indian, who will no longer be treated as half ward and half citizen, but will be recognized as capable of controlling his property and exercising fully his personal rights. Beyond the general principle, competency or incompetency will, of course, be determined by the facts involved in

individual and exceptional cases. The essential announcements of the new policy are as follows;

1. *Patents in fee.*—To all able-bodied, competent, adult Indians there will be given, as far as may be under the law, full and complete control of all their property. Patents in fee shall be issued to all adult Indians who may, after careful investigation, be found competent, provided that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home. At 38. Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1917).

On April 17, 1917, there was announced a declaration of policy for Indian Affairs, as follows:

During the past four years the efforts of the administration of Indian affairs have been largely concentrated on the following fundamental activities—the betterment of health conditions of Indians, the suppression of the liquor traffic among them, the improvement of their industrial conditions, the further development of vocational training in their schools, and the protection of the Indian's property. Rapid progress has been made along all these lines, and the work thus reorganized and revitalized will go on with increased energy. With these activities and accomplishments well under way, we are now ready to take the next step in our administrative program.

The time has come for discontinuing guardianship of all competent Indians and giving even closer attention to the incompetent that they may more speedily achieve competency.

Broadly speaking, a policy of greater liberalism will henceforth prevail in Indian administration to the end that every Indian, as soon as he has been determined to be as competent to transact his own business as the average white man, shall be given full control of his property and have all his lands and

moneys turned over to him, after which he will no longer be a ward of the Government. At 3.

Annual Report of the Secretary of the Interior Vol. 1 (1918).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1918).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1919).

No general law provided a means for citizenship of all Indians until 1887 when Congress passed the general allotment act (24 Stats. L., 388), which provided for the allotment of lands in severalty and declared all Indians born within its limits, who shall have complied with certain conditions, to be citizens of the United States. The broad citizenship provisions of this act were modified by Congress when on May 8, 1906, it passed the Burke Act, since which law the issuance of a fee patent has been the primary legal requirement for citizenship of Indians. It is believed that the controlling factor in granting citizenship to Indians should not be based upon their ownership of lands, tribal or in severalty, in trust or in fee, but upon the fact that they are real Americans and are of right entitled to such citizenship. At 71.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1919).

When, however, an Indian has been given a fee simple patent for all of his lands, both original and inherited, and all individual and tribal funds of whatsoever nature turned over to him, that particular Indian will have become a full fledged citizen of the United States in the full sense of all that term implies. He will no longer be

subject in any respect to supervision by the Government, but will have the same right as any other citizen. His contracts will not be subject to governmental approval, but will stand on an equal footing with those of other citizens. There will be no restriction as to trade with him, and in fact whatever rights may be enjoyed by citizens of the United States will be his and he will be subject to arrest at the instance of a United States superintendent or by the Indian police, nor to trial and punishment by the courts of Indian offenses for misdemeanors over which those courts now have jurisdiction. At 12.

Annual report of the Secretary of the Interior Vol 1 (1920).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1920).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior Vol. 1 (1921).

Removal of restrictions and land sales.—There were issued to competent Indians 1,692 patents in fee, and sales were approved to purchasers of Indian lands covering approximately 136,000 acres in which patents were to be issued. Certificates of competency were issued for 451 tracts, containing 128,350 acres. The policy of issuing patents in fee to Indians of one-half or less Indian blood without further proof of competency was discontinued. It will be the purpose to test as far as possible the applicant of a patent in fee by actual accomplishments on his land or in some productive occupation before recognizing his competency, and according to the same principle to encourage the thrifty, successful Indian of whatever degree of blood to accept full title to his property with all the rights and obligations of complete citizenship. At 54.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1921).

As is well known, the law provides for issuing to the Indian a trust patent upon the land allotted to him, which exempts it from taxation and restricts him from its sale or encumbrance until he is declared competent to manage his business affairs, when he may, upon application, receive a patent in fee and be free to handle or dispose of his land the same as any white citizen.

It is doubtful if a satisfactory method has been found for determining the competency upon which to base a termination of the trust title. Applications for patents in fee have too often been adroitly supported by influences which sought to hasten the taxable status of the property or to accomplish a purchase at much less than its fair value, or from some other motive foreign to the Indian's ability to protect his property rights.

Notwithstanding the sincere efforts of officials and competency commissions to reach a safe conclusion as to the ability of an Indian to manage prudently his business and landed interests, (experience show that more than two-thirds of the Indians who have received patents in fee have been unable or unwilling to cope with the business acumen coupled with the selfishness and greed of the more competent whites, and in many instances have lost every acre they had). It is also true that many of the applications received for patents in fee are from those least competent to manage their affairs, while the really competent Indians are in large numbers still holding their lands in trust. It is evident to the careful observer that degree of blood should not be a deciding factor to establish competency, as there are numerous instances of full-bloods who are clearly demonstrating their industrial ability by the actual use of their land and who are shrewdly content with a restrictive title thereto that exempts them from taxation. At the same time the instances are far too frequent where those of one-half or

less Indian blood—often young men who have had excellent educational privileges—secure patents in fee, dispose of their land at a sacrifice, put most of the proceeds in an automobile or some other extravagant investment, and in a few months are "down and out," as far as any visible possessions are concerned.

The situation, therefore, suggests the need of some revision of practice as a check upon the machinations of white schemers who covertly aid the issuance of fee patents in order to cheat the holders out of their realty, and as a restraint upon those who are not so lacking in competency as in the disposition to make the right use of it, and also as a stimulant to the thrifty holder of a trust title to accept the entire management of his estate with the full privileges and obligations that follow.

The well-known purposes of the Government are to fit the Indian for self-support and to protect his interest while doing so, and then to expect him to do his best toward independent living. The Government should not be expected to shirk its trust. It should not be made easy for young men to squander their substance and drift into vagrancy, nor for successful landholders to remain under restrictions not justified by their qualifications for citizenship. At 25-26.

Annual Report of the Board of Indian Commissioners (1921).

In none of the letters received from field service men by the board is there the least indication that reservation superintendents and employees are opposed to the general proposition of hastening the time when all Indians will be entirely free from Government supervision of their affairs. The charge has been made that the officials and employees of the Bureau of Indian Affairs purposely hinder any activity which might accelerate the progress of Indians toward independent citizenship, so as to prolong the existence of the bureau and, consequently, extend the

length of the employees' services with the Government. None of the superintendents, field clerks, or farmers who answered the letters of this board even suggested the un-wisdom of giving patents in fee which, automatically separating the Indian from Government supervision, tends to reduce the work of the bureau.

On the contrary, almost all of them definitely indicated their approval of turning the Indians loose as soon as the Indians are ready to assume the responsibility of full and independent citizenship. At 7.

Annual Report of the Secretary of the Interior (1922).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1922).

SALES AND REMOVAL OF RESTRICTIONS

The regulations governing the sale of allotted and inherited Indian lands and the issuance of patents in fee and certificates of competency have been modified and revised in many particulars, and as approved bring the practice in these cases more in conformity with transactions between white citizens, particularly in enabling purchasers of Indian lands on the deferred payment plan to assign their interests.

A stricter policy has been followed in issuing patents to Indians on the ground of competency, as seemed to be required in order to more fully protect their interests. At 15.

Annual Report of the Board of Indian Commissioners (1922).

The opinion seems to be held by some people that the paramount duty of Congress and the department is to protect and conserve the property, real and personal, of the Government's Indian wards. No one will deny that

the Government, as a trustee, is obliged to properly care for Indian property, whether lands or moneys. But we believe that no one can successfully deny that the Government, as the guardian of hundreds of thousands of human beings, is under an equal if not a greater obligation to develop and strengthen the intellectual, moral, and physical faculties of its dependent wards in preparation for the time when they will become independent citizens in unrestricted possession of their property. At 2.

Annual Report of the Secretary of the Interior (1923).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1923).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1924).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1924).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1925).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1925).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1926).

The Secretary of the Interior gave only general comments on the progress of allotments.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1926).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1927).

TAXATION OF INDIAN LANDS

Operation of the federal tax acts of May 6, 1910 and December 30, 1916, subjecting to State taxation the allotments of Omaha and Winnebago Indians in Nebraska held under extension of trust periods has caused hardship and embarrassment to the Indian allottees affected, as many of the tracts were yielding little income in excess of the tax levied. Under a principle of law recognized by the courts, real property held in trust by the Federal Government is not taxable by the State and exemption of from taxation of property purchased for noncompetent Indians with their trust funds has been heretofore effected through restrictive clauses inserted in deeds conveying such lands to Indians. Exemption rights so specified have been generally sustained by the courts. This situation is such as to indicate the necessity for remedial legislation. At 56-57.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1927).

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Annual Report of the Board of Indian Commissioners (1927).

EXTENSION OF RESTRICTIONS

The general allotment act, sometimes called the "Dawes Act," became law 40 years ago last February. As a result of the operations of that historic measure, and some subsequent legislation, thousands of Indians were premeaturely given patents in fee to their allotments and passed from the supervisory care of the Federal Government.

Within the next few years a considerable number of Indians will reach the termination of the periods during which their allotments are held in trust for them by the United States. The question concerning the advisability of the extension of the trust patents will arise repeatedly. With the hope that reliable information can be secured which will enable this board to present recommendations and suggestions pertinent to the issue, a committee of board members has been named to study the effects of declaring Indians to be competent, giving them unrestricted titles to their allotments and thus removing them from Federal supervision and protection. At 6.

Annual Report of the Secretary of the Interior (1928).

EXTENSION OF TRUST PERIOD

The period of trust was extended by order of the president on allotments made to Indians of the following named tribes and bands: Nez Perce, Idaho; Prairie Band of Pottawatomie, Kns.; Devils Lake Sioux, N. Dak.; Ton-

kawa (Oakland Reservation), Okla.; and Pawnee, Okla. The period of trust was also extended on lands patented to 16 different bands of Mission Indians in California. At 63.

During the year a circular letter was sent to all superintendents requesting them to submit a list of all Indians under their respective jurisdictions to whom patents in fee were issued prior to 1921, during the trust period and without application therefor. The purpose is to afford relief if possible, through legislation or otherwise, to those whose lands were lost through lack of business efficiency or through taxation. Suits in the name of the United States are now pending to determine the question as to exemption from local taxation, of lands theretofore taxable, which were conveyed to Indians with restrictions against alienation or incumbrance, except with the approval of the Secretary of the Interior, such lands having been purchased for homes and paid for with their trust funds. At 65.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1928).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1929).

In its sixtieth annual report the board declares that the secretary's announced policy should meet the general approval of fair-minded forward-looking friends of the Indian people. Its objective is plainly disclosed in the opening paragraph of the statement, "to make the Indian a self-sustaining, self-respecting American citizen just as rapidly as this can be brought about. At 37.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1929).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Board of Indian Commissioners (1929).

We doubt the advisability of adopting as a fixed part of a Federal Indian policy the proposition that there should be continued allotment of lands "with full ownership rights granted to the Indians." We raise this question because the history of the Indians since 1887, when the general allotment act (the Dawes Act) was passed, conclusively shows that the average Indian and his property are soon parted after he is given a patent in fee to his allotment—that is land with full ownership rights. We beg leave to cite what was called the "New Declaration of Policy," promulgated and put into effect in 1917 and which "turned loose" more than 10,000 Indians in three years with generally unsatisfactory results, so unsatisfactory that this policy was terminated by the Secretary of the Interior in 1921.

We have taken the position that before a restricted Indian is given unrestricted possession of his allotment, excepting where a patent in fee automatically follows the termination of the trust period, the department should carefully investigate his case and determine whether he has demonstrated his ability to manage his own affairs without requiring the supervisory care and protection of the Indian Service. In short, we are of the opinion that the process of turning an Indian loose should be an individual, not a wholesale operation. We fear, therefore, that if the remaining unallotted Indians are allotted their lands with full ownership grants the consequences will be identical with the unsatisfactory results of the group policy of 1917, which made certain degrees of blood status the only prerequisite for granting Indians patents in fee instead of individual qualifications. At 5.

The Board of Indian Commissioners, the Lake Mohonk Conference on Indians, the Indian Rights association, and the missionary boards had much to do with the framing and passage of the Dawes Act. The general opinion of the country on this legislation was expressed in the an-

nual report for 1888 of the Board of Indian Commissioners, as follows:

This bill, which became a law on the 8th of February, 1887, is a great step in advance in our Indian policy, and the day when it was approved by the President may be called the Indian emancipation day. The measure gives to the Indian the possibility to become a man instead of remaining a ward of the government. It affords to him the opportunity to make for himself and his family a home, and to live among his equals a manly and independent life. It offers to him the protection of law and all the rights and privileges and immunities of citizenship.

It is plainly the ultimate purpose of the bill to abrogate the Indian tribal organization, to abolish the reservation system, and to place the Indians on an equal footing with other citizens of the country.

We do not look for the immediate accomplishment of all this. The law is only the seed, whose germination and growth will be a slow process, and we must wait patiently for its mature fruit.

The Dawes Act was revolutionary in that it abruptly changed the character of Indian land ownership from communal to individual, an inversion beyond the comprehension of a primitive people whose way of living was governed by a community state of mind.

The law conferred citizenship upon allottees and provided that an allotment should be held in trust by the Government for 25 years, when a patent in fee would be given the allottee. He then would be released from Federal supervision and could do what he wished with his land.

It was hoped that during this period of Federal trusteeship the Indians would be educated up to a proper appreciation of land possession and value and would hold

their lands and farm them when they were released from restrictions. At 11.

The Burke Act, which amended the general allotment (or Dawes) act of 1887, was passed by Congress in 1906. While it nominally left the trust period at 25 years as provided in the Dawes Act, it gave the Secretary of the Interior rather broad discretionary authority to declare an allotted Indian competent, give him a patent in fee and thus release him from Federal supervision.

For a time the Indian office felt its way somewhat carefully in recommending the issuance of patents in fee under the Burke Act. But this conservatism was cast to the winds some years later when what was known as the "new declaration of policy" was promulgated by the Commissioner of Indian Affairs. At 15.

Allotments.—The results of the Dawes Act and the amendatory legislation have not been what the proponents of the general allotment policy hope for. The statistical data in the Indian Bureau's annual reports show that by reason of allotment tens of thousands of Indians have disposed of their lands, and it is known that the great majority of them sold their allotments for inadequate payments and quickly spent the proceeds. They became landless, moneyless Indians.

The failure of the purpose of the allotment act must be admitted. What has been done can not be undone, but the future handling of Indian lands by the Indian Bureau should be characterized by caution and guided only by consideration for the best interest of the allottees. At 25.

Annual Report of the Secretary of the Interior (1930).

Common sense administration of the affairs of the Indian was not possible under old conditions, since much that should be done by administration has been done by legislation. There is real opportunity at the present time for some constructive legislation by Congress which would open the way to more efficient operation of the problem of the Indian. Concrete suggestions have been

laid before Congress by the Indian Service. The old situation is unsound and will remain so until the Indian takes his place side by side with the rest of our citizenship, with the normal self-respect that goes with self-support. At 24-25.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1930).

The Commissioner of Indian Affairs gave only general comments on the progress of allotments.

Annual Report of the Secretary of the Interior (1931).

We have two major purposes constantly in mind. One is to turn over to the States as many active citizens as possible in lieu of wards supported by a distant Washington government, and the other is to give these people as adequate training in health, education, and economical independence as we can pending the assumption of those responsibilities by the local citizenship. At 12.

Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1931).

To avoid, so far as possible, loss of lands which represent Indian trust funds, through taxation by the state, the purchase of lands which have been taxed and are therefore properly on the tax lists of the county, is discouraged, and superintendents are urged to find suitable tracts which are *still under trust* so that the line of Government supervision and trust and of tax exemption as provided by law or treaty will not be broken.

CANCELLATION OF PATENTS IN FEE

Patents in fee issued to Indians for their allotments prior to 1921 under the so-called "declaration of policy" are being cancelled under the provisions of the act of February 26, 1927 (44 Stat. 1247). More than 300 have been cancelled so far and the number as expected to be greatly increased when applications have been made

under the act of February 21, 1931 (Public 713, 71st Cong.). Each act applies to patents issued during the trust period without application by, or consent of, the patentee. The act of 1931 authorizes cancellation so far as unsold portions are concerned, or the whole where the land has been mortgaged and the mortgage released. The bills enacted into these laws were introduced at the request of the Interior department for the purpose of saving as many as possible of the homes of Indians imperiled by issuance of patents in fee without their application. The greater number have lost their lands through mortgage foreclosure, or tax sales, the fee patents having become effective upon execution of a deed or mortgage by the patentee. At 38.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF YAKIMA AND DALE A. GRAY,
Yakima County Treasurer,
Petitioners,
v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,
v. *Cross-Petitioner,*

COUNTY OF YAKIMA AND DALE A. GRAY,
Yakima County Treasurer,
Cross-Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
NATIONAL LEAGUE OF CITIES, AND
U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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QUESTION PRESENTED

Whether Section 6 of the General Allotment Act authorizes taxation by States and local governments of fee patented land owned by tribal Indians and Indian tribes.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE <i>AMICI CURIAE</i>	2
STATEMENT	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. CONGRESS HAS MANIFESTED A CLEAR PURPOSE OF ALLOWING STATES AND LOCAL GOVERNMENTS TO LEVY TAXES ON FEE PATENTED LANDS	4
A. Section 6 of the General Allotment Act Expressly Authorizes the Imposition of State and Local Taxes on Fee Patented Lands	4
B. The Validity of Section 6 is Unaffected by Subsequent Developments	7
C. The County's Authority to Tax Fee Patented Lands Is Unaffected by <i>Moe</i>	12
II. THE COURT OF APPEALS ERRED IN APPLYING THE ANALYSIS OF <i>BRENDALE</i> TO THIS TAX CASE	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:	Page
<i>Brendale v. Confederated Tribes & Bands of Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	<i>passim</i>
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976).....	3, 5, 6
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987).....	4, 18
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989).....	12
<i>DeCoteau v. District Cty. Court</i> , 420 U.S. 425 (1975).....	16-17
<i>Duro v. Reina</i> , 110 S. Ct. 2053 (1990).....	14
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906).....	3, 6, 7, 14
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987).....	9, 10
<i>McDonald v. United States</i> , 279 U.S. 12 (1929)....	6
<i>McClanahan v. Arizona State Tax Commission</i> , 411 U.S. 164 (1973).....	5
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973).....	5, 18
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976).....	<i>passim</i>
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)...	2, 4, 5, 11
<i>Montana v. United States</i> , 450 U.S. 544 (1981)....	9, 10
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	4, 11
<i>Oklahoma Tax Commission v. United States</i> , 319 U.S. 598 (1943).....	3, 7
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974).....	4
<i>Pittsburgh & Lake Erie R.R. v. RLEA</i> , 491 U.S. 490 (1989).....	11
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983).....	11
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962)...	13, 14, 15, 16
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956).....	3, 6-7
<i>United States v. Borden Co.</i> , 308 U.S. 188 (1939)...	11
<i>Washington v. Confederated Bands & Tribes of Yakima Indian Nation</i> , 439 U.S. 463 (1979)...	8-9, 15, 16
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980).....	17, 18, 19
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981).....	11

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISION:	Page
U.S. Const. art. I, § 8, cl. 3	4
STATUTES:	
18 U.S.C. § 1151	16, 17
18 U.S.C. § 1153	17
General Allotment Act, 25 U.S.C. §§ 331 <i>et seq.</i> :	
25 U.S.C. § 349	<i>passim</i>
25 U.S.C. § 373	11
Indian Land Consolidation Act of 1983, Pub. L. 97-459, Tit. II, 96 Stat. 2519	10
Indian Reorganization Act, 25 U.S.C. §§ 461-479:	
25 U.S.C. § 462	9
25 U.S.C. § 465	9
OTHER AUTHORITIES:	
W. Canby, <i>American Indian Law</i> (2d ed. 1988)....	7-8, 9
F. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	4, 5
D. Getches & C. Wilkinson, <i>Federal Indian Law</i> (2d ed. 1986)	8, 9
D. Otis, <i>History of the Allotment Policy</i> (1934)....	8

IN THE
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OCTOBER TERM, 1991

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**BRIEF OF THE
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NATIONAL LEAGUE OF CITIES, AND
U.S. CONFERENCE OF MAYORS AS AMICI CURIAE
IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS**

INTEREST OF THE AMICI CURIAE

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a manifest interest in legal issues that affect state and local governments, such as issues concerning state and local government taxing authority.

This case raises questions concerning the authority of States and local governments to tax fee patented land on reservations that is owned by tribal Indians and Indian tribes. States and local governments have taxed these lands for years pursuant to the congressional authority conferred by the General Allotment Act of 1887, 25 U.S.C. §§ 331 *et seq.* The court of appeals correctly held that Section 6 of the Act grants States and local governments express authority to tax such fee patented land, although it incorrectly held that this general authority could be implicitly and sporadically revoked by the courts as the result of case-by-case analysis of the impact of taxation on tribal interests. Because of the importance of these issues of taxing authority to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.¹

STATEMENT

Amici adopt the statement of the case of petitioners/cross-respondents.

SUMMARY OF ARGUMENT

Because the federal government is vested with plenary authority over Indian affairs, Congress can authorize the imposition of state and local taxes on Indians. See *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). The test is whether Congress has “‘manifested a clear

¹ The parties’ letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

purpose’” to allow a state or local tax. *Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976) (quoting *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)).

The ad valorem tax imposed by Yakima County on fee patented lands on the Yakima Reservation is authorized by Section 6 of the General Allotment Act. See 25 U.S.C. § 349. Section 6 expressly provides that once the federal government has issued a patent in fee simple for reservation land to a tribal Indian, “all restrictions as to sale, incumbrance, or taxation of said land shall be removed.” The Court, in decisions spanning most of this century, has construed Section 6 to authorize States to tax fee patented land. See *Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956); *Goudy v. Meath*, 203 U.S. 146, 149-50 (1906).

The incessant fluctuation in federal Indian policy has no bearing on this conclusion. The authorization of the General Allotment Act for state and local government taxation of fee patented land remains in full force and effect to this day—evolution of general policy and enactment of subsequent statutory schemes notwithstanding. It is axiomatic that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Neither does *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), alter the outcome of this case. *Moe* assessed the validity of state taxation of cigarette sales and personal property, not taxes on fee patented land. The State sought to justify that taxation as authorized by the first, more general clause of Section 6. In *Moe*, the Court declined to adopt the State’s reading of the first clause of Section 6 as applied to the taxes at issue in that case. However, the Court did not reach the statutory language at the heart of this case, nor did it discuss taxes on land. Moreover, the concerns that caused

the Court to be critical of "checkerboard jurisdiction" in *Moe* are unwarranted here.

While the court of appeals correctly concluded that Section 6 authorizes Yakima County's ad valorem tax on fee patented land, it erred insofar as it held that the validity of that tax as applied to those lands is nevertheless to be determined by application of the analysis of *Brendale v. Confederated Tribes of Bands of the Yakima Nation*, 492 U.S. 408 (1989). See Pet. App. 27a-28a. The Court has squarely held that in taxation cases "it is unnecessary to rebalance . . . in every case" the State's interest in taxation and the Indians' interest in tax immunity. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987).

ARGUMENT

I. CONGRESS HAS MANIFESTED A CLEAR PURPOSE OF ALLOWING STATES AND LOCAL GOVERNMENTS TO LEVY TAXES ON FEE PATENTED LANDS

A. Section 6 of the General Allotment Act Expressly Authorizes the Imposition of State and Local Taxes on Fee Patented Lands

The Constitution vests the federal government with exclusive authority over relations with Indian tribes. U.S. Const. Art. I, § 8, cl. 3; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1984); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); F. Cohen, *Handbook of Federal Indian Law*, 270-72 (1982 ed.). "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after the formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their territory." *Montana v. Blackfeet Tribe*, 471 U.S. at 764.

"In keeping with its plenary authority over Indian affairs," however, "Congress can authorize the imposition

of state taxes on Indian tribes and individual Indians." *Id.* at 765. See also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973). Accordingly, "statutory authorization for states to tax reservation Indians will be found . . . where 'Congress has manifested a clear purpose' to allow a tax." F. Cohen, *supra*, at 407 (quoting *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)). See also *Montana v. Blackfeet Tribe*, 471 U.S. at 765 (congressional authorization to tax must be unmistakably clear); Pet. App. 10a-12a (collecting cases).

Amici respectfully submit that Section 6 of the General Allotment Act,² 25 U.S.C. § 349, contains a clear and unmistakable expression of congressional intent to authorize States and local governments to tax fee patented land on reservations owned by tribal Indians and Indian tribes. In unambiguous language, Section 6 provides that land allotted to Indians and Indian tribes pursuant to the provisions of the Act shall be subject to taxation after the expiration of the trust period prescribed by the Act.

The first clause of Section 6 provides a broad grant of authority to the States. The clause states:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

25 U.S.C. § 349. A 1906 "proviso"³ to the General Allotment Act further states:

² Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 *et seq.*).

³ Where, as here, a "proviso" contains broad and explicit language, and the context indicates that it was not intended "merely to safeguard against misinterpretation or to distinguish different para-

[T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed

Act of May 8, 1906, ch. 2348, 34 Stat. 182 (codified as amended at 25 U.S.C. § 349) (emphasis added).

These two parts of Section 6 provide clear authorization to States and local governments to tax allotted lands that have been patented in fee pursuant to the Act. Furthermore, the legislative history of these provisions, as well as the administrative interpretation given to them over the years, support the same conclusion. *E.g.*, 13 Cong. Rec. 3211 (1882) (Sen. Dawes); 19 Op. Atty. Gen. 161, 169 (1888); 53 L.D. 107 (1930). In short, Congress has "manifested a clear purpose" to allow state taxation of lands owned in fee by Indians. See *Bryan v. Itasca County*, 426 U.S. at 392.

Given the clarity of the statutory language, it is not surprising that the Court has adopted and reaffirmed this reading of Section 6. In *Goudy v. Meath*, 203 U.S. 146 (1906), the Court construed Section 6 and the same treaty language as applies here and concluded, even without reference to the 1906 proviso, that States are authorized to levy real estate taxes on fee patented land owned by Indians. *Id.* at 149-50. In *Squire v. Capoeman*, 351 U.S. 1 (1956), the Court focused on the language of the 1906 proviso. It concluded that

[t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes . . . after a patent in fee is issued to the

graphs or sentences," it will "apply generally to all cases within the meaning of the language used." *McDonald v. United States*, 279 U.S. 12, 21-22 (1929). Such a reading is particularly appropriate where the proviso was added by a subsequent amendment.

allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

Id. at 7-8. In *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), Justice Murphy made the unchallenged statement that lands allotted to Indians were exempt from state taxation under Section 6, but only while the trust restrictions continued. *Id.* at 618-19 (Murphy, J., with Stone, C.J., Reed & Frankfurter, JJ., dissenting in part).

In view of the clarity of the statutory language and this Court's consistent constructions of that language across a period of eighty-five years, there is no tenable basis for the argument that Section 6 does not authorize Yakima County's ad valorem tax on fee patented lands. As the court of appeals persuasively reasoned:

The Court's construction in *Capoeman* of the statute independently reinforces the interpretation given to it in *Goudy*: the State may not tax while the land is held in trust or restriction, but is free to tax after the land had been patented in fee.

Pet. App. 14a. The court of appeals thus correctly held that "the unambiguous statutory language contained in 25 U.S.C. § 349, and the interpretation given to it in *Goudy* and *Capoeman*, manifest Congress's clear intention to permit the states to tax fee patented land owned by Indian tribes or their members." *Id.*

B. The Validity of Section 6 is Unaffected by Subsequent Developments

Since the late nineteenth century, federal Indian policy has been subject to incessant fluctuation. The General Allotment Act aimed to foster assimilation of Indians into society at large because it was believed that assimilation was in the Indians' best interests. See W. Canby, *Amer-*

ican Indian Law 19 (2d ed. 1988) ("There is little question that the leadership for passage of the [General Allotment] Act came from those sympathetic to the Indians."); D. Otis, *History of the Allotment Policy* (1934), quoted in D. Getches & C. Wilkinson, *Federal Indian Law* 112 (2d ed. 1986) ("That the leading proponents of allotment were inspired by the highest motives seems conclusively true.").

The Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-92 ("IRA"), subsequently substituted a policy of Indian autonomy for the policy of assimilation. See W. Canby, *supra*, at 23-25. This policy, in its turn, was criticized by both Indians and the Congress. See D. Getches & C. Wilkinson, *supra*, at 128-30. By the late 1940's, assimilation again had become the goal of federal Indian policy. "In 1949 the Hoover Commission recommended an about-face in federal policy: 'complete integration' of Indians should be the goal so that Indians would move 'into the mass of the population as full, tax-paying citizens.'" *Id.* at 130. By the early 1950's, Congress's "express aim" was "'as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.'" W. Canby, *supra*, at 25 (quoting H. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953)). See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 488 n.32 (1980).⁴

⁴ In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, the Court explained that the policy of assimilation:

was formally announced in H.R. Con. Res. 108, 67 Stat. B132, approved on July 27, 1953, the same day that Pub. L. 280 was passed by the House. 90 Cong. Rec. 9968 (1953). As stated in H.R. Con. Res. 108, the policy of Congress was "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other

Given these full swings in federal Indian policy, the enactment of the IRA in 1934—while it may, for a time, have reflected a "repudiation" of prior policy, see *Moe*, 425 U.S. at 479—cannot sustain the conclusion that the General Allotment Act was invalidated by the passage of the IRA. On the contrary, lands allotted pursuant to the General Allotment Act from 1887 to 1934, such as the lands at issue in this case, remain subject to the detailed provisions of that Act. In fact, the IRA necessarily took account of the continuing legal effect of the Allotment Act by extending the trust period for previously allotted lands. See 25 U.S.C. § 462. Other sections of the IRA also take into account the continuing legal validity of the General Allotment Act.⁵

This Court, too, has repeatedly recognized that the legal status of fee patented land conveyed to Indians pursuant to the General Allotment Act was not altered by the IRA. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Hodel v. Irving*, 481 U.S. 704 (1987); *Montana v. United States*, 450 U.S. 544

citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship" This policy reflected a return to the philosophy of the General Allotment Act of 1887, ch. 199, § 1, 24 Stat. 388, as amended, 25 U.S.C. § 331, popularly known as the Dawes Act, a philosophy which had been rejected with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984.

439 U.S. at 488 n.32.

In the late 1960's assimilation again fell out of fashion and was replaced by the policy of tribal self-determination. See W. Canby, *supra*, at 28-31; D. Getches & C. Wilkinson, *supra*, at 151-54.

⁵ Section 465, for example, authorizes the Secretary of the Interior to acquire lands, including allotted lands, for the Indians. It provides that these lands, once acquired, "shall be exempt from state and local taxation." 25 U.S.C. § 465. This affirmative grant of tax-exempt status to certain lands acquired for the Indians reflects the recognition by Congress that other lands held in fee are taxable by States and local governments under the General Allotment Act.

(1981). In *Hodel*, for example, the Court noted that while the IRA ended future allotment, it did not alter the legal status of land already allotted.⁶ See 481 U.S. at 708-09. And in *Brendale* the Court rejected an argument by the Yakima Nation that is essentially identical to the one that it makes in this case: that after the IRA courts should analyze the legal status of allotted and fee patented land as if allotment had never occurred. As Justice White's plurality opinion explained in rejecting this argument in *Brendale*:

The Yakima Nation argues that we should not consider the Allotment Act because it was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984. But the Court in *Montana* was well aware of the change in Indian policy engendered by the Indian Reorganization Act and concluded that this fact was irrelevant. Although the Indian Reorganization Act may have ended the allotment of further lands, it did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians or prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians.

Brendale, 492 U.S. at 423 (citations omitted). See also *Montana v. United States*, 450 U.S. at 560 n.9 (ending policy of allotment did not alter "the effect of the land alienation occasioned by that policy"). Just as the IRA did not change the legal status of fee patented lands by preventing them from passing to non-Indians, it did not restore the tax exempt status of those lands.

As a matter of well-settled law, moreover, a change in policy, even if it results in a new statute expressing the policy, does not implicitly repeal prior acts of Congress

⁶ At issue in *Hodel* were problems created when allotted lands were divided into small and virtually worthless lots. Congress acted in 1983 to ameliorate the problem of fractioned ownership of Indian lands. See Indian Land Consolidation Act, Pub. L. 97-459, Tit. II, 96 Stat. 2519 (1983).

dealing with the same subject but influenced by the more dated policy. As the Court explained in *Morton v. Mancari*:

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest'."

417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). See also *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 510 (1989); *Watt v. Alaska*, 451 U.S. 259, 267 (1981).⁷

There has never been any indication that Congress repealed or intended to repeal Section 6 of the General Allotment Act.⁸ Given that fact, Congress's presumed knowledge of the consistent application of Section 6, and the peaceful coexistence of Section 6 and subsequent Indian legislation, the detailed provisions of the General Al-

⁷ It is true that these settled principles of statutory construction may not have their usual force in an Indian law case. See *Montana v. Blackfeet Tribe*, 471 U.S. at 766. Nonetheless, the requirement that the Court construe statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *id.*, is not relevant where, as here, the statutes are unambiguous. The General Allotment Act expressly authorizes taxation of Indian-owned, fee-patented land; the IRA contains no language, ambiguous or otherwise, that repeals this authorization. The canon of construction requiring ambiguities to be resolved in favor of the Indians "is not a license to disregard clear expressions of . . . congressional intent." *Rice v. Rehner*, 463 U.S. 713, 733 (1983).

⁸ The Act was the subject of technical amendments as recently as 1987. See Pub. L. 100-153, 101 Stat. 886 (1987), codified at 25 U.S.C. § 373.

lotment Act respecting previously allotted lands are in full force today.⁹

C. The County's Authority to Tax Fee Patented Lands Is Unaffected by *Moe*.

The Yakima Nation contends that *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), takes away Yakima County's authority to tax fee patented land owned by Indians. A careful reading indicates that *Moe* is not at odds with the congressional decision, embodied in Section 6, to authorize taxation of these lands. Furthermore, *Moe* does not establish a per se rule against "checkerboard jurisdiction." In short, the court of appeals correctly concluded that "*Moe* did not rule upon the applicability of section 6 to state taxation of fee patented land." Pet. App. 18a. Several aspects of the *Moe* decision support this conclusion.

Moe involved taxation of cigarette sales and the ownership of personal property, rather than taxation of land. In rejecting the State's claim in that case, the Court ruled that language in the first clause of Section 6 (providing that "every allottee shall . . . be subject to the laws, both civil and criminal, of the State") was insufficient to authorize the state taxation at issue. 425 U.S. at 477-78. The Court did not consider, however, the language added by the 1906 proviso, which states that "all restrictions as to . . . taxation of said land shall be removed." 25 U.S.C. § 349. Nor did the Court discuss its

⁹ In a recent and analogous situation, the Court addressed the effect of the IRA on the authority of States to impose taxes on the activities of nonmembers on reservations. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), the Court refused to invalidate a tax on the basis of an asserted general shift in congressional policy toward maximizing returns to Indians from natural resources. In passing, the Court similarly refused to preempt state taxation due to the general "congressional concern with fostering tribal self-government and economical development" found in the IRA. *Id.* at 193 n.14.

previous decision in *Squire*, in which it ruled that this additional language refers to the taxation of fee patented land and "evinces a Congressional intent to subject an Indian allotment to all taxes . . . after a patent in fee is issued to the allottee." 351 U.S. at 8.

The proposition for which the State argued in *Moe* is different from the proposition for which we argue. In *Moe*, the State argued that all tribe members on a reservation are subject to cigarette sales tax and personal property tax because tribe members whose land had been patented in fee under Section 6 of the Allotment Act remained "subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Moe*, 425 U.S. at 477 (quoting 25 U.S.C. § 349). The Court characterized this argument as "untenable" because "[b]y its terms § 6 does not reach Indians residing or producing income from lands held in trust for the Tribe." *Id.* at 478.¹⁰

There was no way, the Court recognized, to accept the State's position in *Moe* as to taxation without finding that Indians living on fee patented land were, as the clause of Section 6 addressed in *Moe* would have it, subject to all state jurisdiction—civil and criminal. As *Moe*'s discussion of *Seymour v. Superintendent*, 368 U.S. 351 (1962), made clear, however, this simply was not the law. *Seymour* had held that a State could not exercise criminal jurisdiction merely because an offense occurred on fee patented land. *Id.* at 358. The consequence of adopting the State's argument in *Moe* would have been either to subject all Indians to state taxation because some Indians held fee patented land or else—more narrowly, but just as troubling—to allow indiscriminate ex-

¹⁰ There is no indication that any party in *Moe* even held fee patented land so as to come within the terms of Section 6. The cigarette retailer whose sales the State sought to tax operated his shops on trust lands. See 425 U.S. at 467.

ercise of all state jurisdiction, civil and criminal, over those Indians holding such lands.

Our position is far different. We do not ask the Court to find that Section 6 authorizes the State to exercise all forms of jurisdiction over fee patented land or the tribal members who own it. Rather, we contend that Section 6 authorizes States and local governments to tax fee patented land.

Given the issues presented in *Moe*, that case sheds no light on whether Section 6 continues to authorize taxation of fee patented land. *Moe* merely ruled that the general "subject to" language of the first clause of Section 6 and the *Goudy* decision construing that language were inapplicable to the taxation of cigarette sales and personal property ownership. See *Duro v. Reina*, 110 S. Ct. 2053, 2060 (1990) (*Moe* held that States "may not impose certain taxes on transactions of tribal members on the reservation."). *Moe* did not state that *Goudy* was no longer good law, nor did it construe the 1906 proviso to Section 6. The Yakima Nation's reliance on *Moe* in this case is therefore misplaced.

Moe does indicate that checkerboard jurisdiction is a pertinent consideration in some cases. See 425 U.S. at 478 (citing *Seymour v. Superintendent*). Checkerboard jurisdiction is not a source of concern in this case, however. The ad valorem taxation of individual parcels of land is an inherently "checkerboard," case-by-case process.

Seymour involved a habeas petition by an Indian charged in state court with the commission of a burglary on an Indian reservation. Jurisdiction over the offense was in dispute because of multiple and overlapping statutes and treaties. A federal criminal statute, 18 U.S.C. § 1151, explicitly defined "Indian Country" to contain "all land within the limits of any Indian reservation under the jurisdiction of the United States Government,

notwithstanding the issuance of any patent." 368 U.S. at 353.

Based on Section 1151, the Court rejected the State's assertion of criminal jurisdiction. In so holding the Court emphasized the practical and logistical problems that might otherwise result:

Where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

368 U.S. at 358 (footnote omitted).

In *Moe*, the Court analyzed the State's claim of authority to tax cigarette sales and personal property and noted that a similar, sweeping argument had been made by the State in *Seymour*. 425 U.S. at 478. Citing the language quoted above, the *Moe* Court held that "[s]uch an impractical pattern of checkerboard jurisdiction" was contrary to the intent of Congress. *Id.*

Seymour and *Moe* do not stand for the proposition that "checkerboard" jurisdiction is invalid under all circumstances. In fact, the Court has expressly held that checkerboard jurisdiction is permissible. In *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, the Court held that "checkerboard jurisdiction is not novel in Indian law, and does not, as such, violate the Constitution." 439 U.S. at 502. Discussing the impact of

Public Law 280 on the jurisdictional framework affecting reservations, the Court noted that:

The lines the State has drawn may well be difficult to administer. But they are no more or less so than many of the classifications that pervade the law of Indian jurisdiction.

Id. The *Washington* decision thus establishes that checkerboard jurisdiction is lawful. *Cf. Brendale*, 492 U.S. at 430 (plurality opinion of White, J.). Consequently, legislation may give rise to such a scheme in appropriate situations.

Moe and *Seymour* support this conclusion. They simply hold that in certain cases checkerboard patterns of jurisdiction were invalid as contrary to the intent of Congress. *Moe* concluded that practical difficulties inherent in a checkerboard approach to taxing cigarette sales and personal property make that approach impractical and unwarranted under the general "subject to" language of Section 6. *See* 425 U.S. at 478-79. *Seymour* concluded that the plain language of Section 1151 militated against the absurd and impractical result of requiring law enforcement officers to search tract books prior to every arrest. *See* 368 U.S. at 358.

These cases hold that if a checkerboard pattern of jurisdiction creates impractical results that are contrary to statutes passed by Congress, then the scheme is invalid. This is not the case here, however. Property tax assessment necessarily requires resort to the tract books; variations by plot are inevitable. Nor is such taxation contrary to Congressional intent. As we have shown, Congress has expressly consented to state and county taxation of fee patented lands.¹¹

¹¹ The court of appeals also correctly concluded that 18 U.S.C. § 1151 does not affect the outcome of this case. *See* Pet. App. 24a-25a. While this Court has recognized that the definition of "Indian country" in § 1151 may apply to civil questions, *see DeCoteau v.*

II. THE COURT OF APPEALS ERRED IN APPLYING THE ANALYSIS OF *BRENDALE* TO THIS TAX CASE

The court of appeals correctly concluded that States and local governments are authorized by Section 6 to impose taxes on fee patented lands. It erred, however, insofar as it concluded that the analysis of the plurality of the Court in *Brendale v. Confederated Tribes*, *supra*, requires a further, case-by-case balancing of the impact of such taxation on tribal interests. *See* Pet. App. 27a-28a (citing *Brendale*, 109 S. Ct. at 3008 (plurality opinion of White, J.)).

The Ninth Circuit's application to this tax case of *Brendale*-type balancing of state and tribal interests is

District Cty. Court, 420 U.S. 425, 427 n.2 (1975), the court of appeals' conclusion is not to the contrary.

The court of appeals did not hold that fee patented land, which is part of § 1151's definition of "Indian country" for purposes of criminal jurisdiction, is outside "Indian country" for purposes of civil jurisdiction. Rather, the court correctly concluded that § 1151 and the problems of checkerboard criminal jurisdiction it is designed to address are inapplicable to the narrow taxation question presented in this case. *See* Pet. App. 24a-27a. *See also* discussion *supra* at 14-16. Indeed, as this Court recognized in *DeCoteau*, even "within 'Indian country' a State may have jurisdiction over some persons or types of conduct," although as has long been recognized this jurisdiction is "quite limited." 420 U.S. at 427 n.2. We submit, for the reasons discussed above, that the taxation of fee patented lands is a valid exercise of the States' jurisdiction.

In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), this Court rejected a similar attempt to use law applicable to Indian criminal matters to invalidate a state tax on Indians. The criminal statute at issue in that case, 18 U.S.C. § 1153, lists the crimes over which the federal government exercises jurisdiction in Indian country as defined in § 1151. It thus prevents the States from imposing their criminal laws for such crimes on Indians residing on reservations but not enrolled in the governing tribe. The Court, however, rejected the argument that § 1153, "even given the broadest reading to which [it is] reasonably susceptible," prevented the State from imposing its sales and cigarette taxes on Indians residing on the reservation but not enrolled in the governing tribe. *See id.* at 161-62.

incorrect because "[i]n the special area of state taxation of Indian tribes and tribal members, [this Court has] adopted a per se rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). State taxation is distinguished in this regard from other assertions of state jurisdiction. See *id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). "Accordingly, it is unnecessary to rebalance . . . in every case" the State's interest in taxation and the Indians' interest in tax immunity. *Id.* Rather, once "congressional consent" to the tax has been established, no further inquiry is warranted. See *id.*

Consistent with the foregoing, the Court has held that equitable considerations are not relevant in determining the validity of a tax directly affecting Indians. Discussing the imposition of taxes on non-Indian customers of Indian retailers operating on a reservation, the Court has stated that "[s]uch a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

Justice Rehnquist wrote separately in *Colville* to emphasize concerns that are directly relevant here. "Since early in the last century," he wrote,

this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. . . . I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their valid-

ity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.

447 U.S. at 176-77 (Rehnquist, J., concurring in part, concurring in the result in part, and dissenting in part) (footnote omitted).

The appropriate test thus is not whether the tax consented to by Congress will have an adverse effect on Indians. Rather, the sole inquiry in determining whether Yakima County has taxing authority over fee patented lands owned by Indians is whether Congress intended to permit such taxation. As is demonstrated above, Congress has clearly manifested that intent.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as the court held that States and local governments have authority to tax fee patented lands owned by tribal Indians and Indian tribes on reservations, and otherwise should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF YAKIMA, *et al.*,
v. *Petitioners,*

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
Respondents.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,
v. *Cross-Petitioners,*

COUNTY OF YAKIMA, *et al.*,
Cross-Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE WASHINGTON STATE
ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS/CROSS-RESPONDENTS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	2
ARGUMENT	4
ANY JUDICIAL ATTENUATION OF THE FULL TAXABLE STATUS OF ANY FEE LAND, AS EXPRESSED IN 25 U.S.C. § 349, WOULD CRE- ATE A SCHEME BOTH UNWORKABLE AND UNFAIR	4
A. Current Federal Regulation and Practice Is Con- sistent With Local Taxation of Indian Owned Fee Land, Regardless of the Solicitor's Position in This Case	4
B. As a Consequence of and in Reliance Upon 25 U.S.C. § 349, Municipalities Have Built Infra- structure Improvements and Have Provided Services to Reservations, and They Continue to Do So	8
C. A Finding That Fee Land Owned by Indians Is Not Subject to Taxation Would Increase Juris- dictional Confusion on Reservations Rather Than Lessen the "Checkboard" Effect	11
D. The Inability of Officials to Determine the Tax Status of the Fee Holder by Title Search Will Render the Budget Process of States and Politi- cal Subdivisions Unmanageable	13
E. A Finding That Fee Land on Reservations Is Not Taxable in Indian Hands Would Greatly Expand the Opportunities for Abuse Without Detection..	15
CONCLUSION	16

TABLE OF AUTHORITIES

CASES	Page
<i>Brendale v. Confederated Tribes and Bands of Yakima Nation</i> , 109 S.Ct. 2994 (1989)	3, 13
<i>City of Tacoma v. Andrus</i> , 457 F.Supp. 342 (D.C. Dist. 1978)	5, 8
<i>Confederated Tribes and Bands of Yakima Nation v. County of Yakima</i> , 903 F.2d 1207 (9th Cir. 1990)	3
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	7
<i>Montana v. U.S.</i> , 450 U.S. 544 (1981)	8
<i>Seymour v. Superintendent of Washington State Penitentiary</i> , 368 U.S. 351 (1961)	12
<i>United States v. Bd. of Commr's of Sheffield Alabama</i> , 435 U.S. 110 (1978)	7
STATUTES	
25 U.S.C. § 349	3, 4, 7-9, 12, 14
25 U.S.C. § 465	5, 14
25 U.S.C. §§ 461 et seq. (Indian Reorganization Act)	4
Wash. Rev. Code Section 84.52.040	13
Wash. Rev. Code Section 84.52.070	13
Wash. Rev. Code Section 84.64.050	15
MISCELLANEOUS	
25 C.F.R. § 151.10	6, 7
45 Fed. Reg. 62034-62037 (Sept. 18, 1980)	5
Wash. Const. Art. VII, § 2	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

 No. 90-408

COUNTY OF YAKIMA, *et al.*,
Petitioners,
 v.

CONFEDERATED TRIBES AND BANDS
 OF THE YAKIMA NATION,
Respondents.

 No. 90-577

CONFEDERATED TRIBES AND BANDS
 OF THE YAKIMA NATION,
Cross-Petitioners,
 v.

COUNTY OF YAKIMA, *et al.*,
Cross-Respondents.

 On Writs of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

 BRIEF OF THE WASHINGTON STATE
 ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN
 SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

The Washington State Association of Counties (WSAC) respectfully submits this brief in support of the petitioners/cross-respondents, County of Yakima, et al.

INTEREST OF THE AMICUS CURIAE

The Washington State Association of Counties (WSAC) consists of the county governments in the State of Washington.

In twenty-six states the Bureau of Indian Affairs has jurisdiction over more than 1000 acres of reservation or trust lands. In these states alone, the total acreage of such land exceeded 53 million acres in 1985, an area larger than all New England and the eastern third of New York State. Approximately 2,500,000 acres of such land existed in Washington at that time. No accurate figures are known on the portion of such land which is Indian-owned, but of the approximately 79,046 residents of such land in Washington, approximately 10,440 were Indian, or about 21% in 1980.¹

County members of WSAC have since statehood been the instruments of state government responsible for assessment and collection of tax liens for the state and all taxing districts, upon all land within Indian reservations in the state, except property of the United States, of the state or its political subdivisions and of that held in trust by the United States for Indians. WSAC member counties, and most other political subdivisions of the state of Washington are primarily dependent upon such tax revenues to service the extensive infrastructure improvements and governmental services to persons and property within reservations.

If, as the Yakima Nation requests, the continuation of nearly 100 years of state taxation of all Indian-owned fee patent land within reservations is construed as pro-

¹ WSAC Amicus Curiae Brief in Support of Petition for Certiorari, App. p. 1a.

hibited, amici counties and all their Indian and non-Indian citizens will suffer great disruption of governmental services, both within and outside reservations.

Beyond these practical interests in preserving the land base for taxes which attach to real property, amici counties have a compelling concern for development of coherent and workable decisional law relating to taxation powers of state and local governments on Indian reservations. The decision of the Court of Appeals concluded that the express authorization by Congress of taxation of Indian lands within reservations upon issuance of fee patents under 25 U.S.C. § 349 remains effective. Nonetheless, the court below remanded the proceedings for further analysis under the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 109 S.Ct. 2994 (1989), to determine whether such "taxation would affect [the Yakima Nation] in a demonstrably serious way[.]" *Confederated Tribes and Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1218 (9th Cir. 1990) ; Petition at 28a.

The opinion below at least contemplates the possibility that judicially developed principles could supersede explicit Congressional action. The Yakima Nation, in its Petition for Certiorari, eschews the appropriateness of review under *Brendale*, but asks directly for a judicial declaration that the express Congressional authorization of taxation of fee patented lands was repealed. It contends that the implication arises from subsequent statutes, which neither deal with tax exemption, nor with retroactive effect of any policies which were changed.

Amici Counties have an interest in encouraging the Court to reject such an improper exercise of judicial power in this and future cases. Amici are also interested in discouragement of any inference that Congress intended, by less than explicit action, to destroy vested

rights, efficient governmental operations, and legal certainty.

Amicus have great interest in showing the extraordinary impacts, which the cross-petition seeking retroactive application and implied repeal, would cause, and which may not be obvious.

ARGUMENT

The Washington State Association of Counties believes the Court should grant the relief requested by Petitioner/Cross-Respondent, Yakima County, for the following reason:

ANY JUDICIAL ATTENUATION OF THE FULL TAXABLE STATUS OF ANY FEE LAND, AS EXPRESSED IN 25 U.S.C. § 349, WOULD CREATE A SCHEME BOTH UNWORKABLE AND UNFAIR

The briefs of amici States and petitioner Yakima County clearly demonstrate that section 6 of the General Allotment Act (25 U.S.C. § 349)² has never been repealed by Congress, either expressly or by implication in the later Indian Reorganization Act (25 U.S.C. §§ 461 *et seq.*). The legislative, judicial, and administrative history of these acts show that fee land on reservations, regardless of the race or tribal affiliation of the fee holder is fully taxable. Amicus WSAC will demonstrate to the Court in this brief both that local experience and practice fully support fact of taxability and also the untoward consequences and illogic of altering the law upon which this practice is based.

A. Current Federal Regulation and Practice Is Consistent With Local Taxation of Indian Owned Fee Land, Regardless of the Solicitor's Position in This Case

Respondent's novel theory, that fee land on a reservation is not taxable if found to be in Indian hands, was

² Reproduced in full in WSAC Amicus Brief in Support of Petition for Cert., App. pp. 2a, 3a.

outside the pale of anyone's contemplation a few short years ago. The case of *City of Tacoma v. Andrus*, 457 F.Supp. 342 (D.C. Dist. 1978) is instructive as to the prevailing understanding of the law as recently as 1978.

The case arose when a number of Indians who lived within the historic boundaries of the Puyallup Reservation in Tacoma, Washington granted their property to the Secretary of Interior to be taken in trust by the United States for their own benefit, pursuant to 25 U.S.C. § 465 (App. p. 6a). The City of Tacoma and others sued in the District of Columbia Federal Court to enjoin the Secretary of Interior from future takings in trust. The major reason for this suit was the loss of tax revenues when land was taken into trust and the relief requested included a declaration that any lands already taken into trust would be subject to local taxation and regulation notwithstanding their trust status. 457 F.Supp. at 342-343.

The Bureau of Indian Affairs presented testimony in that case concerning the guidelines under which the bureau would take lands into trust. They declared that the Secretary would *only* accept property on reservations and *only* where the proposed beneficial owner was an enrolled member of the reservation tribe. 457 F.Supp. 343-344.

Judge Gesell of the District Court declined to "detail" what he considered to be appropriate circumstances for the exercise of the Secretary's "discretion." Noting that regulations setting forth the factors to be considered by the Secretary in determining whether to accept properties into trust were pending, the Court determined that the specific acquisitions in question were within the exercise of the secretary's discretion. *Id.* 457 F.Supp. 346.

After receiving much comment and holding several hearings on the proposed regulations to which Judge Gesell deferred, the Secretary of Interior adopted and published final regulations at 45 Fed. Reg. 62034-62037 on

September 18, 1980 setting forth the factors to be considered in evaluating every request for acquisition of property by the United States in trust for Indians or Indian tribes, *whether within reservations or in authorized areas outside reservations*.

The regulations reflect the uniform interpretations of the United States since the adoption of statutes authorizing fee patents which are recited in detail by the states and counties filing *amicus* briefs herein. The regulations were codified in 25 C.F.R. Part 120a [changed to Part 151 in 1982]. Section 151.10 reads in pertinent part as follows:

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors: . . .

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflict of land use may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

. . . . (App. p. 7a.)

The foregoing sequence of events admits of only one interpretation. As late as 1978, the Bureau, the Tribe in question, the District Court, and the municipalities assumed that Indian owned fee land was taxable. Municipalities challenged the Secretary's action to take into trust fee land owned by Indians on a reservation, and that challenge was based on loss of taxable status. There is not even a hint in the case that any party believed that so long as the land was in the hands of an Indian it was automatically non-taxable. Such an interpretation would have rendered the litigation moot. The United States ad-

mitted in that case that the policy was to take into trust only lands that were on reservations.

Regulations were promulgated shortly thereafter to assess the jurisdictional and tax consequence of taking fee land into trust. Section 151.10 remains unchanged from that promulgation to the present. It has remained the interpretation of Congressional intent actually applied by the United States Department of the Interior, the department charged with implementing federal Indian statutes, both before and during the present proceedings. The new position taken in these proceedings by the Solicitor General simply ignores the continuing interpretation followed by the Department.

Appendix, pp. 1a-5a consists of two representative notices sent to counties on other reservations in Washington filed after the opinion below. The notices demonstrate the continuing practice of the Department specifically reciting the provisions of 25 C.F.R. Part 151.10 as applicable to the Secretary's determination whether to approve applications to accept reservation fee properties into trust.

Factors (e) through (g) of Section 151.10 would be meaningless unless it were the interpretation of the United States that fee lands are within the taxing jurisdiction of state and local government prior to acceptance in trust. The Court should infer that Congress expressed its acceptance of this 1980 interpretation, if not before, when it subsequently amended some of the statutes upon which the regulation was based, without expressly overruling the construction placed thereon by the Secretary. *United States v. Bd. of Commr's of Sheffield Alabama*, 435 U.S. 110, at 135, 136 (1978); *Lorillard v. Pons*, 434 U.S. 575 at 581, 582 (1978). The implied repeal of 25 U.S.C. § 349 suggested by the Yakima Nation and the Solicitor would make acceptance into trust unnecessary to remove fee land from state taxation. It would thereby render the statutes implemented by the Secretary virtually

meaningless. A construction that would render many statutes meaningless should not be indulged by the Court.

B. As a Consequence of and in Reliance Upon 25 U.S.C. § 349, Municipalities Have Built Infrastructure Improvements and Have Provided Services to Reservations, and They Continue to Do So

The stipulated facts for summary judgment in the case at bench (see Joint Appendix p. 36 *et seq.*) detail the extensive and expensive services and facilities provided by the State and municipalities on just the Yakima Reservation at issue. The Yakima experience is not unique. In many reservations the impact of the position espoused by the Yakima Nation would be much more striking. One example, the original Puyallup Reservation at issue in *Tacoma v. Andrus, supra*, is almost completely within the second most populous city in the state and two other small municipalities. Until recent acquisitions, trust property over which the Tribe exercised jurisdiction comprised less than 1% of the 22,000 acres in the original reservation. Political subdivisions of the State of Washington have provided all infrastructure and government services to fee property owned by Indians and non-Indians within the area. The industrial area of Pierce County and the second largest container port in the United States have been built within the area, primarily from state and local property tax revenues from the property served. The contention of the Yakima Nation that Indian fee land now owned, or hereafter acquired, within reservations should be exempt from taxes upon property would affect many reservations much more than on the Yakima reservation.

Section 6 of the Allotment Act (25 U.S.C. § 349) resulted in the enlargement of local jurisdiction for all purposes within reservations. This was evidently the intent of the Act itself. *Montana v. U.S.*, 450 U.S. 544, at 559, n.9 (1981). As the amount of reservation land allotted in fee increased, the services and jurisdiction taken by State and local governments increased concomitantly.

It was the fee status described in § 349 that caused this enlargement of local jurisdiction. Municipalities built roads, started schools, and performed law enforcement, social service, and all other government functions. Counties, cities and states continue to own, pay debt service upon, and maintain these facilities and services upon fee lands over which we were granted jurisdiction. The services and infrastructure must be paid for. The tax upon land patented in fee has always been, and continues to be, the primary source of repaying bond issues which were necessary to build the infrastructure, and of paying for the services required within the reservations as a result of actions taken under the General Allotment Act.

Clearly Indian governments and the Federal Government also provide significant services and even infrastructure improvement on reservations, as they should. On some reservations, much land is held in trust by the Federal Government for tribes or their members, and a rough symmetry has evolved between the amount of trust land and the services provided by the United States and the tribe.

Though state and local jurisdictions provide services to Indians on some trust land and tribal government and the United States provide services on some on fee land within reservations, the amount of services provided by state and local governments is also roughly proportional to the amount of fee land on reservations. For the Court to rip away municipal funding based on the blood lines of the person who happens to hold title to property in the year of assessment would deprive all reservation citizens of much needed services and would make maintenance of and payment for existing infrastructure improvements difficult, if not impossible.

For those items of infrastructure owned by state and local governments, the resulting loss of tax base would amount to a federal taking of municipal property. The roads, bridges, hospitals and schools were purchased, and

have been or must be paid for by all of the citizens of the local jurisdiction. To deprive the state and local jurisdictions of the tax revenue necessary to pay for and maintain infrastructure improvements and to pay for services upon which the area has come to depend is fundamentally unfair, if not unconstitutional.

Real estate taxes constitute a major source of revenue for services and facilities. In the state of Washington, these taxes are the primary source of revenue for political subdivisions. The total amount of property tax that can be collected by any political subdivision in Washington without a super-majority vote is constitutionally limited to 1% of the property value, no matter how much the value of the tax base declines. Wash. Const. Art. VII, § 2 (WSAC Amicus Brief in Support of Petition for Certiorari, App. pp. 4a, 5a.) Because the need for governmental services continues to increase, the effect of constitutional and statutory limitations is that most jurisdictions in Washington are already levying a tax rate on all taxable property at or near the maximum statutory rate allowed by law. Thus local governments cannot assign more of the tax burden to the non-Indian owned fee land. The contention of the Yakima Nation would presently deprive many state and local governments of necessary revenue for the areas over which they have extended facilities and services. The effect upon most states would be similar.

If Tribal or Federal governments assumed the obligation of providing services to such property, as is done when property is to be accepted into trust, at least many expensive obligations for future services would be reduced, though ownership and maintenance of existing facilities would not be resolved. Neither the Tribe nor the United States suggest that they would be required to relieve states and local governments from future obligations to Indian fee land simply upon purchase in fee by a tribal member within a reservation. Even if they were required or willing to do so, they would have the same

problem that state and local governments experience in budgeting and providing necessary services, if change in tax status could occur simply by private purchase. Under the present process, trust applications can occur only after the tax consequence of acceptance is known.

Even if it were within the power of Congress to unilaterally remove jurisdictional rights vested in states under express statutes and accepted by them, which we believe it is not, state and local governments should not be subjected to the devastating result, by a judicial construction. Repeal must be based on clear and unequivocal Congressional language changing the relevant provisions of former law, and expressing an intention that the repeal be given retroactive effect.

C. A Finding That Fee Land Owned by Indians Is Not Subject to Taxation Would Increase Jurisdictional Confusion on Reservations Rather Than Lessen the "Checkerboard" Effect

As we pointed out in our amicus curiae brief in support of the Petition For Certiorari, this Court's doubt about the desirability of "checkerboard jurisdiction" was expressed in a case where eschewing it promoted sensible government. That doubt is not, however, a rule of law to be invoked when it will result in chaos. See WSAC Cert. Brief at page 5.

Respondent Yakima Indian Nation has invoked the concept of "checkerboard jurisdiction" as a sort of taboo term with thaumaturgical properties, which requires that when the phrase is invoked, all legal analysis must be abandoned so that checkerboarding can be avoided. Amicus WSAC pointed out in its certiorari brief that the existing obligation of assessors to search land title records makes real property tax determinations, which are dependent upon whether property is held of record in trust by the United States, a normal part of the assessment function. Preserving the different tax treatment created

by Congress between trust and fee lands within reservations would not burden tribes or state and local governments; differing criminal jurisdiction or even the assessment of tax upon sales or personal property might. It is the duty of the Assessor to "search tract books" in applying the tax, whereas the police officer's function might be unduly constrained if he were forced to do a title search before he could arrest an Indian on reservation land. See *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 at 358 (1961).

A finding of tax immunity on Indian owned fee land would further fractionalize jurisdictional interests rather than minimizing them, would make them more uncertain the boundaries between jurisdictions. Since the adoption of 25 U.S.C. § 349, there have been two types of interests having different tax treatment ((1) land held in trust by the United States Government, and (2) land held in fee that is fully alienable). If the position of respondent Yakima Indian Nation prevails, three types of interests involving tax jurisdiction affecting real property will be created, ((1) trust land, (2) taxable fee land owned by non-Indians, and (3) non-taxable but alienable fee land owned by Indians). The borders of these categories will change from day-to-day, depending on who sells what land to whom. The chaotic consequences for local jurisdictions and tribes from this kind of scheme should be self evident. Local officials can search land records to find out whether record title has been accepted by the United States in trust. That has always been part of their function. They are ill equipped to search the blood lines of the title holder, however, and Congress should not be deemed to have required them to do so, particularly without finding express language restoring tax exemption retroactively to support an implication that repeal was intended.

D. The Inability of Officials to Determine the Tax Status of the Fee Holder by Title Search Will Render the Budget Process of States and Political Subdivision Unmanageable

The shifting tax jurisdiction lines described above, based not on the facts disclosed of record, but on the lineage of the title holder at a given time, is more than just a headache for the officials who assess taxes. It will also, as described in our amicus brief in support of certiorari, render the budget process unmanageable. The reasons bear repeating here.

It is the law in Washington State that each political subdivision must spread the tax burden equally over all taxable property within the taxing district. Wash. Rev. Code Section 84.52.040 (WSCA Amicus Brief in Support for Petition for Certiorari, App. p. 6a.) Municipal officials must set levy rates with this goal in mind.

On or before the 30th of November of each year, the budgets and amounts and rates of tax to be levied for the next year for all political subdivisions of the State must be certified to the County Assessor. Wash. Rev. Code Section 84.52.070 (WSAC Amicus Brief in Support of Petition for Certiorari, App p. 6a). Most states use similar procedures to determine real property tax levies.

If the decision of the Court of appeals remanding for consideration in light of *Brendale v. Confederated Tribes*, 109 S.Ct. 2994 (1989) is allowed to stand, as none of the parties believe it should, case-by-case litigation of the taxable status of every piece of Indian-owned fee land every year could result.

If the more certain interpretation espoused by the Yakima Nation were adopted instead, states and municipalities would still be unable to anticipate the level of revenue upon which they can plan, because taxability would depend on the whimsical nature of private real estate transactions from year to year. It would be vir-

tually impossible for taxing officials to know what reservation property is taxable and what is not taxable before making irrevocable budgeting and expenditure decisions, if taxability depended upon the race and enrollment status of the title holder. Indeed title could change from Indian to non-Indian hands and then back into Indian hands all within a single assessment year. Because tribal membership of owners would not be known until the owner chose to come forward to provide evidence, it is almost certain that it would be several years after levy of taxes, and after obligation of funds, in reliance upon a known quantity of taxable land, that counties would learn of claimed exemptions of Indian-owned fee land within reservations. The reduction in real property liable to pay tax would become known only long after all services for which tax was levied have been provided, and long after the opportunity to reduce expenditures or spread the loss over the rest of the taxable property had expired.

Unlike the existing trust acquisition process which has been determinative of tax exemption for land within reservations under the existing law, no event such as recording of acceptance by the United States of a deed in trust would be available upon which state and local officials could rely to determine what property is or is not taxable within reservations. Presumably this is one of the reasons Congress chose to create the process of authorizing acceptance of fee land in trust, rather than repealing the provisions of 25 U.S.C. § 349 which rendered property taxable upon issuance of a fee patent and 25 U.S.C. § 465 which restored exemption upon acceptance into trust. This is yet another reason why the Court should not infer that Congress intended to repeal the provisions of § 349.

If taxability depends on the race and enrollment status of the fee holder not disclosed by title records, state and local jurisdictions will be faced with numerous new legal

and budgetary problems. For example, Washington law provides a three year grace period before the state can foreclose on real property for non-payment of taxes. Wash. Rev. Code Section 84.64.050 (App. pp. 8a-10a). What would happen if title passes from non-Indian to Indian hands within the three year period without payment of back taxes, penalties, and interest still owing on the property, with no opportunity for the United States to require payment of existing liens before acceptance of title? Could the jurisdiction still foreclose on the property, because the lien arose before the property became exempt?

E. A Finding That Fee Land on Reservations Is Not Taxable in Indian Hands Would Greatly Expand the Opportunities for Abuse Without Detection

If tax jurisdiction rides not on whether record title is in the United States in trust, but upon the race of the record title holder, the way is opened for a multitude of abuses. Nothing would prevent non-Indians seeking to avoid taxation of reservation fee land, from transferring record title to an enrolled tribal member, while preserving beneficial use by contract or otherwise. Scrutiny by the United States which currently surrounds acceptance of property into trust would not exist. Large commercial buildings, residential tracts, farms, and forests could be, and we believe *will be* transferred to Indian "fronts" for token consideration with conditions so strict that all beneficial use will inure to the non-Indian transferor. If respondent Yakima Nation's position is upheld by this Court, nothing would preclude such a practice. It would be difficult for Congress to remedially amend the law so as to avoid these abuses so long as taxability depends on the race of the record title holder rather than whether record title is in the name of the United States.

CONCLUSION

Amicus curiae, Washington State Association of Counties, respectfully requests that Washington tax which attaches to real property be deemed applicable to all lands held in fee as to which fee patents issued pursuant to the General Allotment Act. It further requests that the Court of Appeals judgment be reversed to the extent it held that consideration of whether such tax imperils the respondent/cross-petitioner's political integrity, economic security, health or welfare.

Respectfully submitted,

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APPENDIX

1a

APPENDIX

In Reply Refer To:
Real Property
Management

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Puget Sound Agency
3006 Colby Avenue, Federal Building
Everett, WA 98201

March 22, 1990

Pierce County Executive
Room 585 County-City Building
Tacoma, WA 98402

Dear Sir:

This Agency has under consideration an application for acquisition of land by the United States to be held in trust for the benefit of The Puyallup Tribe. A plat is attached and the parcel is described as:

All that part of the SE $\frac{1}{4}$ of Section 12 and the NE $\frac{1}{4}$ of Section 13, Township 20 North, Range 3 East of the Willamette Meridian in Pierce County, Washington, more particularly described as follows: Commencing at the southeast corner of said Section 12; thence N. 89 30'05"W. along the south line of said Section to a point that is 25.0 feet distant west, measured at right angles, from the east line of said Section and the True Point of Beginning; thence continuing N. 89 30'05" W. along said south line, a distance of 959.60 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 01 13'03" W., a distance of 442.82 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 84 21'02" W. a distance of 25.20 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 75 23'52" W., a distance of 132.67 feet to a $\frac{5}{8}$ " iron

rebar with cap; thence S. 61 27'51" W., a distance of 204.26 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 01 13'03" W., a distance of 351.32 feet to a $\frac{5}{8}$ " iron rebar with cap; thence N. 59 06'49" W., a distance of 294.83 feet to a $\frac{5}{8}$ " iron rebar with cap; thence N. 60 57'58" E., a distance of 23.11 feet to a $\frac{5}{8}$ " iron rebar with cap; thence N. 59 06'49" W., a distance of 387.66 feet to a $\frac{5}{8}$ " iron rebar with cap; thence N. 01 07'40" E., a distance of 573.88 feet to a point on the south line of said Section 12, said point also designated with a $\frac{5}{8}$ " iron rebar with cap; thence N. 89 30'50" W. along said south line, a distance of 322.63 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 01 01'56" W., a distance of 435.23 feet to a $\frac{5}{8}$ " iron rebar with cap; thence N. 62 37'20" W., a distance of 432.93 feet to a point that is 30.0 feet distant east, measured at right angles, from the north/south centerline of said Section 13, said point also being designated by a $\frac{5}{8}$ " iron rebar with cap; thence N 01 01'56" E. along a line parallel with said north/south centerline, a distance of 239.49 feet to a point on the south line of said Section 12, said point also being designated by a $\frac{5}{8}$ " iron rebar with cap; thence N. 02 43'28" E. along a line parallel with and 30.0 feet distant east of the north/south centerline of said Section, a distance of 770.08 feet to a $\frac{5}{8}$ " iron rebar with cap; thence S. 85 41'03" E., a distance of 2563.87 feet to a point that is 25.0 feet distant west of said east line of Section 12, said point also designated by a $\frac{5}{8}$ " iron rebar with cap; thence S. 01 49'27" W., along a line parallel with said east line, a distance of 598.96 feet to the Point of Beginning, containing 57.0 acres, more or less.

The determination whether to acquire this property in trust will be made in the exercise of discretionary authority which is vested in the Secretary of the Interior. To assist us in the exercise of that discretion, pursuant to regulations published in 45 Fed. Reg. 62034 (September 18, 1980), 25 CFR Part 151, we invite your comments on

the proposed acquisition. In particular, information on the following matters is requested:

1. The annual amount of property taxes currently levied on the property.
2. Any special assessments, and amounts thereof, which are currently assessed against the property.
3. Any governmental services which are currently provided to the property by your jurisdiction.
4. If subject to zoning, how the property is zoned.

Information and comments should be addressed to this agency, to the attention of the undersigned. Any comments received within 30 days of the date of this letter will be considered. A copy of your comments will be made available to the applicant. A determination of whether to acquire the land in trust will be made by the Area Director, P.O. Box 3785, Portland, OR 97208. If you have submitted comments within 30 days of this letter, you will be notified of the Area Director's determination.

Sincerely,

/s/ William A. Black
WILLIAM A. BLACK
Superintendent

4a

[SEAL]

In Reply Refer To:
Realty-Acq. & Disp.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Colville Indian Agency
Post Office Box 111
Nespelem, Washington 99155-0111

May 10, 1991

Okanogan County Commissioners
Okanogan County Courthouse
Okanogan, WA 98840

Dear Commissioners:

This agency has under consideration an application for acquisition of land by the United States of America to be held in trust for the benefit of the Vicki L. Harlan. The property is described as follows:

Lot 4, Brooks Tracts of Julie A. Brooks (Allotment No. S-660), Colville Indian Reservation in Section 34, to 34, No., R. 26 E., WMW and Section 31, T. 34 N., R. 27 E., WMW, Okanogan County.

The determination whether to acquire the property in trust will be made in the exercise of discretionary authority which is vested in the Secretary of the Interior. To assist us in the exercise of that discretion, pursuant to regulations published at 45 Fed. Reg. 62034 (September 18, 1980), 25 CFR 151.10(e), we invite your comments on the proposed acquisition. In particular, information on the following matters is requested:

1. The annual amount of property taxes currently levied on the property.
2. Any special assessments, and amounts thereof, which are currently assessed against the property.

5a

3. Any governmental services which are currently provided to the property by your jurisdiction.
4. If subject to zoning, how the property is currently zoned.

Information and comments should be addressed to this agency, to the attention of the undersigned. Any comments received within thirty (30) days of the date of this letter will be considered. A copy of your comments will be made available to the applicant.

A determination of whether to acquire the land in trust will be made by the Area Director, Portland Area Office, Bureau of Indian Affairs, Post Office Box 3785, Portland, Oregon 97208. If you have submitted comments within thirty (30) days of this letter, you will be notified of the Area Director's determination.

/s/ Sharon A. Redthunder
SHARON A. REDTHUNDER
Real Property Officer

cc: Okanogan County Planning Dept.
Okanogan County Treasurer
Okanogan County Assessors

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

(June 18, 1934, c. 576, § 5, 48 Stat. 985.)

25 C.F.R. § 151.10. Factors to be considered in evaluating requests.

In evaluating requests for the acquisition of land in trust status, the Secretary shall consider the following factors:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

Wash. Rev. Code (1989)

§ 84.64.050 Certificate to county—Foreclosure—Notice—Prohibition on issuance of certificate on certain residential property. After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer shall proceed to issue certificates of delinquency on said property to the county for all years' taxes, interest, and costs: *Provided*, That the county treasurer, with the consent of the county legislative authority, may elect to issue a certificate for fewer than all years' taxes, interest, and costs to a minimum of the taxes, interest, and costs for the earliest year.

The county treasurer may include in the certificate of delinquency any assessments which are due on the property and are the responsibility of the county treasurer to collect. For purposes of this chapter, "taxes, interest, and costs" include any assessments which are so included by the county treasurer.

The change to a three-year grace period shall first be effective on May 1, 1983. Prior to that date, the county treasurer shall send a notice to all taxpayers with taxes delinquent for two years or more, notifying them of the change in the grace period. The treasurer shall file said certificates when completed with the clerk of the court, and the treasurer shall thereupon, with such legal assistance as the county legislative authority shall provide in counties having a population of thirty thousand or more, and with the assistance of the county prosecuting attorney in counties having a population of less than thirty thousand, proceed to foreclose in the name of the county, the tax liens embraced in such certificates, and the same proceedings shall be had as when held by an individual: *Provided*, That notice and summons must be served or notice given in a manner reasonably calculated to inform the owner or owners, and any person having a recorded

interest in or lien of record upon the property, of the foreclosure action. Either (1) personal service upon the owner or owners and any person having a recorded interest in or lien of record upon the property, or (2) or publication once in a newspaper of general circulation, which is circulated in the area of the property and mailing of notice by certified mail to the owner or owners and any person having a recorded interest in or lien of record upon the property, or, if a mailing address is unavailable, personal service upon the occupant of the property, if any, is sufficient. In addition to the legal description on the tax rolls, the notice must include the local street address, if any. It shall be the duty of the county treasurer to mail a copy of the published summons, within fifteen days after the first publication thereof, to the treasurer of each city or town within which any property involved in a tax foreclosure is situated, but the treasurer's failure to do so shall not affect the jurisdiction of the court nor the priority of any tax sought to be foreclosed. Said certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against said property may be brought in one action and all persons interested in any of the property involved in said proceedings may be made codefendants in said action, and if unknown may be therein named as unknown owners, and the publication of such notice shall be sufficient service thereof on all persons interested in the property described therein, except as provided above. The person or persons whose name or names appear on the treasurer's rolls as the owner or owners of said property shall be considered and treated as the owner or owners of said property for the purpose of this section, and if upon said treasurer's rolls it appears that the owner or owners of said property are unknown, then said property shall be proceeded against, as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming

to have an interest therein, are hereby required to take notice of said proceedings and of any and all steps thereunder: *Provided*, That prior to the sale of the property, if such property is shown on the tax rolls under unknown owners or as having an assessed value of three thousand dollars or more, the treasurer shall order or conduct a title search of the property to be sold to determine the legal description of the property to be sold and the record title holder, and if the record title holder or holders differ from the person or persons whose name or names appear on the treasurer's rolls as the owner or owners, the record title holder or holders shall be considered and treated as the owner or owners of said property for the purpose of this section, and shall be entitled to the notice provided for in this section.

The county treasurer shall not issue certificates of delinquency upon property which is eligible for deferral of taxes under chapter 84.38 RCW but shall require the owner of the property to file a declaration to defer taxes under chapter 84.38 RCW. [1989 c 378 § 37; 1986 c 278 § 64. Prior: 1984 c 220 § 19; 1984 c 179 § 2; 1981 c 322 § 4; 1972 ex.s. c 84 § 2; 1961 c '15 § 84.64.050; prior: 1937 c 17 § 1; 1925 ex.s. c 130 117; RRS § 11278; prior: 1917 c 113 § 1; 1901 c 78 § 3; 1899 c 141 § 15; 1897 c 71 § 98.]

11 2
Nos. 90-408 and 90-577

Supreme Court, U.S.

FILED

JUN 27 1991

OFFICE OF THE CLERK

**In The
Supreme Court of the United States
October Term, 1990**

COUNTY OF YAKIMA, et al., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA NATION, RESPONDENT

CONFEDERATED TRIBES AND BANDS OF THE
OF THE YAKIMA NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, et al.,
CROSS-RESPONDENTS

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

**BRIEF OF AMICI CURIAE STATES OF MONTANA,
COLORADO, MINNESOTA, NORTH DAKOTA,
AND SOUTH DAKOTA IN SUPPORT OF
PETITIONERS/CROSS-RESPONDENTS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. SECTION 6 OF THE GENERAL ALLOTMENT ACT, AS AMENDED IN 1906, EXPRESSLY CONSENTS TO STATE TAXATION OF ALLOTTED LANDS UPON ISSUANCE OF A FEE PATENT	5
II. THE PLURALITY OPINION IN <u>BRENDALE</u> HAS NO RELEVANCE TO THIS MATTER	25
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	5
Board of Commissioners v. United States, 87 F.2d 55 (10th Cir. 1936)	14
Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 208	Passim
Bryan v. Itasca County, 426 U.S. 373 (1976)	18
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	18, 21, 25
Chatterton v. Lukin, 154 P.2d 798 (Mont. 1945)	15
Choate v. Trapp, 224 U.S. 665 (1912)	13, 14, 20
Confederated Tribes and Bands of Yakima Nation v. County of Yakima, 903 F.2d 1207 (9th Cir. 1990)	2
County of Thurston v. Andrus, 586 F.2d 1212 (8th Cir. 1978), <i>cert. denied</i> , 441 U.S. 952 (1979)	15
DeCoteau v. District County Court, 420 U.S. 425 (1975)	21

TABLE OF AUTHORITIES - Continued

Page

General Motors Acceptance Corporation v. Chischilly, 628 P.2d 683 (N.M. 1981)	21
Glacier County v. United States, 99 F.2d 733 (9th Cir. 1938)	14
Housing Authority of Seminole Nation v. Harjo, 790 P.2d 1090 (Okla. 1990)	21
In re Heff, 197 U.S. 488 (1905)	3, 8, 9
Love v. Board of County Commissioners, 253 U.S. 17 (1920)	14
Mahnomen County v. United States, 319 U.S. 474 (1943)	Passim
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	18
Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)	18
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976)	4, 18, 22
Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)	24
Morton v. Mancari, 417 U.S. 535 (1974)	23

TABLE OF AUTHORITIES - Continued

	Page
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976)	6
Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association, 491 U.S. 490 (1989)	23
Squire v. Capoeman, 351 U.S. 1 (1956)	16, 17, 20
Sweet v. Schock, 245 U.S. 192 (1917)	13, 14
Traynor v. Turnage, 485 U.S. 535 (1988)	23
United States v. Benewah County, 290 F. 628 (9th Cir. 1923)	14
United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869)	8
United States v. Glacier County, 74 F. Supp. 745 (D. Mont. 1947)	15
United States v. Lewis County, 95 F.2d 236 (9th Cir. 1938)	14
United States v. Montana, 450 U.S. 544 (1981)	7
United States v. Nez Perce County, 95 F.2d 232 (9th Cir. 1938)	14

TABLE OF AUTHORITIES - Continued

	Page
United States v. Nice, 241 U.S. 591 (1916)	8
United States v. Rickert, 188 U.S. 432 (1902)	11, 12
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)	18
CONGRESSIONAL HEARINGS	
Hearings on H.R. 7902 Before House Committee on Indian Affairs, 73d Cong. 2d Sess. (1934)	6, 19
Hearings on S. 2755 and S. 3645 Before Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934)	20
CONGRESSIONAL REPORTS	
H.R. Rep. No. 1558, 59th Cong., 1st Sess. (1906)	9
H.R. Rep. No. 306, 80th Cong., 1st Sess. (1947)	21
S. Rep. No. 1998, 59th Cong., 1st Sess. (1906)	11

TABLE OF AUTHORITIES - Continued

	Page
DEPARTMENT OF THE INTERIOR OPINIONS	
50 L.D. 691 (1924)	17
53 I.D. 133 (1930)	17
FEDERAL INDIAN TREATIES	
March 24, 1832 Treaty with Creek Tribe, 7 Stat. 366 (1832)	5
December 29, 1835 Treaty with Cherokee Tribe, 7 Stat. 478 (1836)	5
FEDERAL STATUTES	
Act of February 8, 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354)	Passim
Act of February 28, 1891, 26 Stat. 795 (codified at 25 U.S.C. § 397)	24
Act of January 30, 1897, 29 Stat. 506	8
Act of June 28, 1898, § 29, 30 Stat. 495	12
Act of May 8, 1906, 34 Stat. 182 (codified in part as amended at 25 U.S.C. § 349)	Passim
Act of June 21, 1906, 34 Stat. 325	15

TABLE OF AUTHORITIES - Continued

	Page
Act of May 27, 1908, 35 Stat. 312	18
Act of May 29, 1924, 43 Stat. 244 (codified at 25 U.S.C. § 398)	24
Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479)	4, 18
Act of June 25, 1948, 62 Stat. 683 (codified as amended at Title 18, United States Code)	24
MISCELLANEOUS AUTHORITIES	
Comment, <i>Tribal Self-Government and the Indian Reorganization Act of 1934</i> , 70 Mich. L. Rev. 955 (1972)	19
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942)	Passim
F. Prucha, <i>The Great Father</i> (1984)	6, 20
Furber, <i>Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War</i> , 14 U. Puget Sound L. Rev. 211 (1991)	19
Institute for Government Research, <i>The Problem of Indian Administration</i> (1928)	20

TABLE OF AUTHORITIES - Continued

Page

N. Singer, <i>Statutes and Statutory Construction</i> § 47.09 (4th ed. 1984)	23
United States Department of Interior, <i>Federal Indian Law</i> (1958)	17

Amici curiae States of Montana, Colorado, Minnesota, Montana, North Dakota and South Dakota, through their respective Attorneys General, respectfully submit pursuant to S. Ct. R. 37.5 a brief in support of the petitioners/cross-respondents' position with respect to the authorization under section 6 of the General Allotment Act, 25 U.S.C. § 349, for states to impose property taxes on lands patented in fee thereunder and the inapplicability of *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), to determining the scope of such authorization.

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INTEREST OF AMICI CURIAE

Each amicus curiae State contains one or more Indian reservations in which land was allotted and eventually patented in fee under the General Allotment Act of 1887. All currently impose, or desire to impose, ad valorem taxes on such land even if owned by tribes or their members. Three amici States are presently involved in judicial or administrative proceedings seeking to invalidate such taxation.¹ While the aggregate amount of affected taxes in the amici States has not been calculated, it is almost certainly substantial.

Beyond the very practical fiscal interest the amici States possess in maintaining or expanding present property tax bases, they have a more generalized concern

¹*United States v. South Dakota*, No. 90-301 (D.S.D.); *Assiniboine and Sioux Tribes v. Montana*, No. CV-89-271-BLG (D. Mont.); *Blackfeet Tribe v. Adams*, No. CV-89-100-GF (D. Mont.); *Cook v. LaPlata County Bd. of Comm'rs*, No. 12825 (Colo. St. Bd. of Assessment Appeals).

in the development of coherent decisional law relating to the taxation powers of state and local governments on Indian reservations. This matter involves an instance in which, as the Court of Appeals concluded, Congress has expressly authorized the taxation of lands within such reservations. The court below nonetheless remanded the proceeding for further preemption analysis under the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989), to determine whether such "taxation would affect [the Yakima Nation] in a demonstrably serious way[.]" *Confederated Tribes and Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1218 (9th Cir. 1990); Petition at 28a. The Court of Appeals' analysis in the latter regard contemplates at least the possibility of judicially developed principles superseding an explicit statement of congressional will in an area where Congress has unquestioned supremacy. Aside from the manifest impropriety of arrogating such power to the courts, the proposed *Brendale* analysis would embroil states, tribal taxpayers and, more than likely, the federal government in complicated, repetitive litigation.

SUMMARY OF ARGUMENT

The General Allotment Act embodied an effort to dissolve the political relationship between tribes and their members. The touchstone of this effort was allotment in severalty of lands to individual members for a 25-year trust period, after which fee patents were to be issued. Under section 6 of the Act as originally adopted, allottees were given upon completion of the allotment and patenting process the benefit of, and made subject to, "the laws, both civil and criminal of the State or Territory in which [they] may reside" and made citizens of the United

States. Act of Feb. 8, 1887, § 6, 24 Stat. 388, 390. In response to *In re Heff*, 197 U.S. 488 (1905), Congress amended section 6 in 1906 to substantially its present form and rendered allottees subject to state or territorial law only upon issuance of fee patents. The 1906 amendment additionally gave the Secretary of the Interior the power to issue a fee patent "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs" and provided that, upon the patent's issuance, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed[.]" Act of May 8, 1906, 34 Stat. 182, 183 (codified in part at 25 U.S.C. § 349).

Over the 40 years following the 1906 amendment, a significant body of decisional law developed concerning whether land patented in fee could be taxed by state and local governments. The issue in that litigation, however, was not whether section 6 constituted congressional consent to such taxation -- since no one disputed that it did -- but whether allottees had consented to such taxation during that portion of the original trust period remaining after the fee patent issued. Cases involving the identical question also arose under other reservation-specific legislation comparable to the amended section 6, the most important of which was *Mahnomen County v. United States*, 319 U.S. 474 (1943). *Mahnomen County*, like the section 6 cases, assumed the existence of congressional consent to the challenged state tax and dealt only with the consent issue.

The purposes attendant to the General Allotment Act's passage and subsequent amendment, the literal language of the 1906 amendment itself, and the ensuing litigation over whether allottee consent to taxation during the original trust period had occurred all point to the conclusion that section 6 as amended authorizes states to

tax allotted lands upon issuance of a fee patent irrespective of the taxpayer's status as a tribe or tribal member. This conclusion is not altered by termination of the allotment process in the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479), the 1948 recodification of Title 18 of the United States Code in which a definition for Indian country was added, or *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). The Court of Appeals therefore correctly held that section 6 permitted the petitioners/cross-respondents to impose the challenged property tax.

The Court of Appeals, however, erred in remanding the proceeding for further consideration in light of the plurality opinion in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (1989). *Brendale* involved the question whether a tribe had inherent power to impose its zoning ordinance on nonmember-owned properties. No issue concerning such power is implicated by the taxation here, whose propriety all parties and amici curiae agree must be determined by whether section 6 contains a requisitely clear congressional authorization to tax. The lower court accordingly should have remanded the proceeding with instructions to dismiss the respondent/cross-petitioner's claim directed to the Washington property tax.

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ARGUMENT

I. SECTION 6 OF THE GENERAL ALLOTMENT ACT, AS AMENDED IN 1906, EXPRESSLY CONSENTS TO STATE TAXATION OF ALLOTTED LANDS UPON ISSUANCE OF A FEE PATENT.

A.

Individual treaties have provided for the allotment² of reservation or other lands to tribal members,³ but the General Allotment Act of 1887 was the first statute of general application to authorize individual allotments. Act of Feb. 8, 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354). The statute was viewed at the time of its enactment as reformist legislation, designed to remedy past wrongs to Indians by making it possible for them to become economically self-sufficient and thereby independent of their tribes:

The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in

²Allotment is a term of art in Indian law. ... It means a selection of the specific land awarded to an individual allottee from a common holding." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972) (citation omitted).

³See generally F. Cohen, *Handbook of Federal Indian Law* 63-64 (1942) (discussing allotment provisions in treaties negotiated between 1854 and 1861). Several removal-related treaties also authorized allotment to individual members of lands ceded under their provisions. *E.g.*, Dec. 29, 1835 Treaty with Cherokee Tribe, art. 12, 7 Stat. 478, 483-84 (1836); Mar. 24, 1832 Treaty with Creek Tribe, arts. II, V, 7 Stat. 366 (1832).

the concepts of property was fundamental in the contrast between the two ways of life. That the white man's way was good and the Indian's way was bad, all agreed. So, on the one hand, allotment was counted on to break up tribal life.

On the other hand, the allotment system was to enable the Indian to acquire the benefits of civilization. The Indian agents of the period made no effort to conceal their disgust for tribal economy.

D. Otis, *History of the Allotment Policy*, reprinted at *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before House Committee on Indian Affairs*, 73d Cong., 2d Sess. 430 (1934) ("*Readjustment of Indian Affairs*"); see also II F. Prucha, *The Great Father* 659 (1984) ("II F. Prucha") ("Allotment of land in severalty ... was part of the drive to individualize the Indian that became the obsession of the late nineteenth-century Christian reformers and their friends in government and did not stand by itself. The breakup of tribalism, a major goal of this Indian policy, had been moved forward by the abolition of the treaty system and would be carried on by a government educational system and by the extension of American law over the Indian communities. Yet for many years the dissolution of communal lands by allotment, together with the citizenship attached to private landowning, was the central issue"). The Court has thus commented that "[t]he objects of [the allotment] policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their dissimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1

(1976); see also *United States v. Montana*, 450 U.S. 544, 559 n.9 (1981) (observing that "[t]he policy of the [various allotment acts] was the eventual assimilation of the Indian population ... and the 'gradual extinction of Indian reservations and Indian titles'" and that, "throughout the congressional debates, allotment of Indian lands was consistently equated with the dissolution of tribal affairs and jurisdiction").

The General Allotment Act accomplished these purposes by directing the President, "whenever in his opinion any reservation or any part thereof ... is advantageous for agricultural and grazing purposes," to allot specified quantities of reservation land to tribal members. Act of Feb. 8, 1887, § 1, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331). Upon approval of an allotment, a trust patent issued "declar[ing] that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever[.]" *Id.*, § 5, 24 Stat. 389 (codified as amended at 25 U.S.C. § 349). Section 6 of the original statute granted citizenship, *inter alia*, to allottees "upon the completion of said allotments and the patenting of the lands" and, at such time, made them subject "to the laws, both civil and criminal, of the State or Territory in which they may reside[.]" *Id.*, § 6, 24 Stat. 390.

Although there was some ambiguity over whether section 6, as enacted in 1887, conferred citizenship upon issuance of the trust patent or issuance of the fee patent,

the Court held in 1905 that an allottee became a citizen, and therefore subject to state or territorial law, upon receipt of the trust patent. *In re Heff*, 197 U.S. 488 (1905). In so holding, the Court reversed a conviction under federal law for selling alcohol to an allottee who had received only a trust patent.⁴ The congressional response to *Heff* was the 1906 amendment to section 6, Act of May 8, 1906, 34 Stat. 182 (codified in part at 25 U.S.C. § 349).⁵ The House report accompanying the bill

⁴The involved federal statute, Act of Jan. 30, 1897, 29 Stat. 506, prohibited sale of alcohol "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government[.]" The Court rejected the Solicitor General's suggested interpretation that section 6 conferred citizenship status only upon issuance of a fee patent and then concluded that the statute was unenforceable insofar as it attempted through exercise of federal police power to regulate "the internal trade of the States". 197 U.S. at 507 (quoting from *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 45 (1869)). It further concluded that federal regulatory power did not exist under the Indian Commerce Clause once an Indian was "emancipated from federal control" by the grant of citizenship and subjection to state law. *Id.* at 509. The last aspect of *Heff* was overruled in *United States v. Nice*, 241 U.S. 591, 601 (1916).

⁵In relevant part the 1906 amendment read:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act or under any law or treaty, and every Indian born

(continued...)

adopted without substantive modification as the amendment stated that, since *Heff*, "there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians" and deemed it "advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive jurisdiction of the United States." H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906). The report continued on:

⁵(...continued)

within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said lands shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

The bill also provides and authorizes that the Secretary of the Interior, in his discretion, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her own affairs, may cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said lands shall be removed, and if that should be done it would follow as a matter of course, under the provisions of this bill, that the allottee would then become a full citizen and no longer subject to the exclusive jurisdiction of the United States.

The latter aspect of the amendment was viewed by the Commissioner of Indian Affairs as "perhaps the most important in the bill":

It is a long step in the right direction, and the great need of such a provision is apparent under existing law, and it would become all the more urgent if the other provisions of the pending bill should be enacted. There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of its burdens, while at the same time the number of "wards of the Government" will be gradually reduced. The process, however, is well safeguarded. Before a fee-simple patent is issued the bill makes it the duty of the Secretary of the Interior to satisfy himself of the civic competency of the allottee concerned.

Id. at 4. Removal of the restrictions against alienation, encumbrance and taxation was thus viewed by both the House Committee on Indian Affairs and the Department of the Interior as an adjunct to the status of a fee-patented allottee as a citizen who, having been deemed capable of managing his affairs like other citizens, not only possessed the right to control disposition of his land but also was expected to bear the ordinary obligations, such as taxation, attendant to property ownership. *Accord* S. Rep. No. 1998, 59th Cong., 1st Sess. (1906).⁶

"The provision for removal of restrictions on alienation and taxation simply made explicit what had otherwise been established in *United States v. Rickert*, 188 U.S. 432 (1902). There the Court determined that state taxes could not be assessed against lands allotted under the General Allotment Act while still held in trust by the United States:

If, as is undoubtedly the case, these lands were held by the United States in execution of its plans relating to Indians, -- without any right in the Indians to make contracts in reference to them, or to do more than occupy and cultivate them, -- until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the state of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the nation, in a condition of pupillage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privilege of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race[.]

(continued...)

B.

There can thus be no legitimate dispute over Congress's objective with respect to the first proviso to section 6: Once a fee patent issued for certain land, it became both capable of conveyance at the owner's discretion and subject to taxation. That the proviso constituted congressional consent to taxation is reflected vividly in a long series of decisions concerned with whether state taxes could be applied during that portion of the original 25-year trust period remaining after issuance of a fee patent.

Under an 1897 agreement incorporated into statute, Choctaw and Chickasaw tribal members were allotted shares of land set aside for their benefit in the Oklahoma Territory. Act of June 28, 1898, § 29, 30 Stat. 495, 505. The agreement provided that all such land was nontaxable for a period of 21 years while in the allottee's ownership but permitted alienation of specified portions of the land at various intervals. *Id.*, 30 Stat. 507. Congress later enacted legislation removing all restrictions as to alienation

⁶(...continued)

Id. at 437; see also *United States v. Mitchell*, 445 U.S. 535, 544 (1980) ("[i]t is plain ... that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land ... in trust' ... because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation"). This aspect of *Rickert* was referred to during the House debate on the section 6 amendment. 40 Cong. Rec. 3599 (1906) (remarks of Rep. Curtis). The notion that the privilege of alienability normally carried with it the obligation to pay state taxes was reiterated shortly after the 1906 amendment's adoption in *Goudy v. Meath*, 203 U.S. 146, 149 (1906), where the Court in part sustained application of Washington property taxes to on-reservation land owned in fee by a tribal member on that basis.

and taxation of lands of the type subject to allotment under the 1897 agreement. Act of May 27, 1908, 35 Stat. 312. When Oklahoma attempted to tax those lands on the basis of the subsequent statute, the Court held in *Choate v. Trapp*, 224 U.S. 665 (1912), that the agreement's immunity against taxation was a property right vested within the various allottees which was not diminished by the more general statute:

Restrictions on alienation were removed by lapse of time. [The allottee] could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary, the privilege of nontaxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the right to grant. That right fully vested in the Indians and was binding upon Oklahoma.

Id. at 673. *Choate* did not address whether a restriction against taxation could be removed by an allottee taking affirmative action to have a fee patent issued or whether an allottee could recover taxes voluntarily paid on fee land otherwise subject to such a restriction. However, in *Sweet v. Schock*, 245 U.S. 192 (1917), the Court indicated that a tax exemption could be forfeited upon application for

issuance of a fee patent,⁷ and in *Love v. Board of County Commissioners*, 253 U.S. 17 (1920), it recognized that state taxes voluntarily paid by an allottee on fee land subject to a restriction against taxation could not be recovered.⁸ The reasoning in *Choate*, *Sweet* and *Love* was thereafter extended expressly or implicitly to situations where, pursuant to his section 6 authority, the Secretary issued fee patents to allottees before expiration of the 25-year trust period, with courts resolving the taxation issue by reference to whether the allottee had consented to issuance of the fee patent or voluntarily paid the state taxes. Compare *Glacier County v. United States*, 99 F.2d 733 (9th Cir. 1938) (finding no consent and therefore no state taxation authority); *United States v. Lewis County*, 95 F.2d 236 (9th Cir. 1938) (same); *United States v. Nez Perce County*, 95 F.2d 232 (9th Cir. 1938) (same); *Board of Commissioners v. United States*, 87 F.2d 55 (10th Cir. 1936) (same); and *United States v. Benewah County*, 290 F. 628

⁷The specific issue in *Sweet* was the taxable status of land allotted to a member of the Creek Tribe and later conveyed to nonmembers. Prior to the first of these conveyances, the allottee requested removal of the restriction against alienation. 245 U.S. at 193-94. At the time of this request a statute, Act of Apr. 26, 1906, § 19, 34 Stat. 137, 144, provided that removal of the alienation restriction would render the affected land taxable. The Court held the conveyed land subject to taxation, remarking in part that the Creek member, in accepting the fee land free of restrictions, "did so under the conditions imposed by [applicable] laws[.]" *Id.* at 196.

⁸*Love* involved members of the Choctaw Tribe who had paid property taxes on allotted lands subject to the same restrictions at issue in *Choate*. Although the Court "accepted so much of the [Oklahoma] Supreme Court's decision as held that, if the payment was voluntary, the moneys could not be recovered in the absence of a permissive statute," it found the "decision that the taxes were paid voluntarily ... without any fair or substantial support." 253 U.S. at 22, 23.

(9th Cir. 1923), with *United States v. Glacier County*, 74 F. Supp. 745 (D. Mont. 1947) (finding consent and therefore state taxation authority); and *Chatterton v. Lukin*, 154 P.2d 798 (Mont. 1945) (same); see also *County of Thurston v. Andrus*, 586 F.2d 1212, 1219-20 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) (collecting various federal and state cases on the consent question).

The Court itself addressed the consent issue in *Mahnomen County v. United States*, 319 U.S. 474 (1943), under a 1906 statute applicable in part only to the White Earth Reservation. Act of June 21, 1906, 34 Stat. 325. The statute, enacted six weeks after the section 6 amendment, stated "[t]hat all restrictions as to the sale, encumbrance or taxation for allotments with the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments[.]" 34 Stat. 353. Pursuant to this statute restrictions against alienation and taxation were removed when an allottee, on whose behalf the United States sued, reached majority in 1911, and she commenced paying state property taxes. Because her trust patent had issued in 1902 with a 25-year trust period contemplated, the United States initiated an action in 1940 to recover only tax payments made between 1911 and 1927, conceding that any limitation on the county's power to tax the property expired in 1928 with the termination of the 25-year trust period. 319 U.S. at 475. The Court concluded that all of the challenged taxes had been paid voluntarily, observing that 1911-1921 payments had been made without protest and that the allottee had entered into a settlement agreement with respect to 1922-1927 taxes, "for which tax exemption is claimed, [and] for

the years 1928-34, for which there is no conceivable claim of exemption." *Id.* at 478. Justice Murphy dissented on the consent question, but he also recognized the 1928-1934 taxes were "admittedly due." *Id.* at 483 (Murphy, J., dissenting). There was, in sum, unanimity among the parties and on the Court that the challenged taxes could be assessed outside the 25-year trust period -- and even within such period if consent existed.

Thirteen years after *Mahnomen County* the Court again acknowledged the evident purpose of section 6's first proviso. In *Squire v. Capoeman*, 351 U.S. 1 (1956), the issue was whether federal capital gain taxes for the year 1943 were required to be paid on proceeds from the sale of timber harvested from allotted lands still held in trust. The Court determined that "the promise to transfer the fee 'free from all charge or incumbrance'" in section 5 of the General Allotment Act precluded even federal taxation. In reaching this conclusion, it remarked that the first proviso in section 6 "gave additional force" to the allottee's claimed exemption and reasoned:

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. ... The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patented fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes[.]

Id. at 7-8 (footnote omitted). The Court further stated that two Attorney General's opinions and Felix Cohen's 1942 Indian law treatise, all of which supported the

federal tax's inapplicability, were "entitled to consideration" as "relatively contemporaneous official and unofficial writings[.]" *Id.* at 9. Here, both a 1924 Department of the Interior opinion⁹ and the Cohen treatise¹⁰ support the validity of the Washington tax's application to lands allotted under the General Allotment Act and now held in fee by the respondent/cross-petitioner or its members. The Court's analysis in *Squire*, finally, is singularly ironic since it specifically rejected the United States' position that the proviso applied *only* to state and local taxation -- a position which the Government now argues directly against. Brief for United States as Amicus Curiae at 11-13.

⁹50 L.D. 691, 694 (1924) ("[w]hen an allottee voluntarily applies for a removal of restrictions [by requesting issuance of a fee patent] prior to the expiration of the period of exemption originally provided for, the granting of such application subjects those lands to taxation even in the hands of the original allottee"); accord 53 L.D. 133 (1930).

¹⁰F. Cohen, *supra* note 3, at 259 ("[s]hould [an allottee] ... apply for the issuance of a fee patent and be accorded one [under the General Allotment Act], there seems no reason to believe that his lands would not thereby be subject to state taxation"); accord United States Dep't of Interior, *Federal Indian Law* 859 (1958).

C.

That the section 6 proviso satisfies the decisionally-developed principle that state taxation of reservation-based activities or property of tribes and their members must be clearly authorized by Congress¹¹ would therefore seem incontrovertible. The respondent/cross-petitioner nonetheless argues that the adoption of the Indian Reorganization Act ("IRA"), Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479), the 1948 addition of a definition for Indian country in 18 U.S.C. § 1151, and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), counsel against the "continued viability" of the proviso. Cross-Petition at 7; Memorandum of Respondent at 3-5. However, nothing in the IRA, the 1948 recodification of Title 18 of the United States Code, or *Moe* suggests that the taxation authorization in the first proviso has been repealed impliedly.

Although the IRA terminated further allotment of reservation lands and extended indefinitely trust periods as to allotments previously made but as to which fee patents had not issued (25 U.S.C. §§ 461, 462), the statute contained no provision affecting the status of allotted lands previously patented in fee. Since Congress knew the effect of a fee patent's issuance on the taxable status of the involved land, it thereby elected to maintain the then-existing distinction between fee and trust lands for

¹¹E.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *Washington v. Confederated Tribes of Colville Indian Res.*, 447 U.S. 134, 163-64 (1980); *Bryan v. Itasca County*, 426 U.S. 373, 375-77 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

state and local taxation purposes, providing only that land acquired in trust by the Secretary for tribes or individual members would be exempt from such taxation. 25 U.S.C. § 465.¹² Thus, the IRA's termination of the

¹²As initially proposed by the Department of the Interior, the IRA would have made significantly more substantive changes in existing law than the finally enacted statute. See, e.g., Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240-52 (1991); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 961-69 (1972). Yet, even under the original bill there was implicit recognition of the taxable status of previously allotted lands as to which fee patents had issued and no provision for modifying such status. H.R. 7902, 73d Cong., 2d Sess., title III, § 7 (1934), reprinted in *Readjustment of Indian Affairs* at 9 (authorizing the Secretary, "in the case of trust or other restricted lands or lands to which fee patents have hitherto been issued to Indians and which are unencumbered, to accept voluntary relinquishments of, and to cancel the patent or patents or any other instrument removing restrictions from the land"). Another provision of the bill would have permitted the Secretary to establish new reservations or expand existing ones, with the newly acquired lands not subject to taxation "so long as title to them is held by the United States or by an Indian tribe or community[.]" *Id.*, title III, § 16, reprinted in *Readjustment of Indian Affairs* at 11. The latter provision, recognizing the fiscal impact of removing such lands from the tax base, further obligated the United States to "assume all governmental obligations of the State or county in which such lands are situated with respect to the maintenance of roads across such lands, the furnishing of educational and other public facilities to persons residing thereon, and the execution of proper measures for the control of fires, floods, and erosion, and the protection of the public health and order in such lands" or to enter into agreements with state or local governments for such services under which those governments would be compensated for their expenses. The absence of any reference to the taxable status of allotted land subsequently patented in fee was hardly an oversight, since the Meriam Report submitted to the Secretary of the Interior (continued...)

allotment process did not impliedly repeal the removal of restrictions against taxation in the first proviso of section 6; indeed, finding such a repeal would be directly inconsistent with *Mahnomen County* and *Squire* which both indicated the continuing validity of the proviso after the IRA's passage in 1934. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 423 (1989) (plurality opinion) ("[A]lthough the [IRA] may have ended the allotment of further lands, it did not ... prevent already allotted lands for which fee patents were subsequently issued from thereafter passing to non-Indians"). The voluntary nature of IRA coverage, finally, would mean that the proviso is inoperative on only those reservations accepting the statute's provisions -- a result hardly consonant with common sense. 25 U.S.C. § 478; see II F. Prucha at 964-65 (258 IRA elections held, with 181 tribes voting for and 77 tribes voting against coverage;

¹²(...continued)

had identified state and local property taxes as "without doubt ... an important factor in causing the loss of Indian lands by so large a proportion of those Indians who have been declared competent." Institute for Gov. Research, *The Problem of Indian Administration* 477 (1928). Indeed, Senator Wheeler -- the chairman of the Senate Committee on Indian Affairs and a sponsor of the legislation eventually enacted as the IRA -- evinced substantial knowledge of *Choate* and later section 6 consent decisions during questioning of the Department of the Interior's acting Solicitor. *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before Senate Committee on Indian Affairs*, 73d Cong., 2d Sess. 185-91 (1934); see also *id.* at 270 (legal analysis submitted by Commissioner of Indian Affairs discussing congressional power to subject Indian property to state taxation); *id.* at 320-21 (1934 *Washington Post* article authored by Commissioner of Indian Affairs describing operation of the General Allotment Act and its effect on landownership).

14 other tribes did not hold elections and therefore were deemed covered).

The 1948 recodification of Title 18 of the United States Code also says nothing about the continuing validity of the first proviso. Even if one assumes that the definition of Indian country in 18 U.S.C. § 1151 determines the geographical area in which special federal Indian law preemption principles apply,¹³ those principles were used by the Court of Appeals in determining that the proviso constitutes an express authorization for application of the ad valorem tax. Neither the language of § 1151 nor its legislative history¹⁴ remotely hints that by inclusion of all reservation lands, whether fee patented or not, within the definition of Indian country Congress intended to undo the explicit consent to state taxation in the proviso. The Court of Appeals was wholly correct,

¹³See *Cabazon*, 480 U.S. at 207 n.5; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). *Cabazon* and *DeCoteau* involved civil regulatory or adjudicatory issues arising within the boundaries of admitted or claimed reservations; whether federal Indian law preemption principles apply in full force in non-reservation Indian country is an issue which has not been addressed by the Court and which has caused some difficulty to state courts. See *Housing Authority of Seminole Nation v. Harjo*, 790 P.2d 1090 (Okla. 1990); *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 683 (N.M. 1981). Presently, of course, only reservation areas are affected by the challenged state ad valorem tax.

¹⁴The only legislative history associated with the definition of Indian country is an explanation for the proposed addition of § 1151 in the House report accompanying the recodification bill. H.R. Rep. No. 306, 80th Cong., 1st Sess. A91-A92 (1947). The report commented that "[t]his section consolidates numerous conflicting and inconsistent provisions of law into a concise statement of applicable law" and identified the decisions from which the several elements of the definition were derived. *Id.*

therefore, in deeming § 1151 irrelevant to the validity of the Washington property tax. 903 F.2d at 1215; Petition at 20a - 21a.

The last contention -- that *Moe* held the first proviso impliedly repealed -- finds no support in the text or logic of the decision. The Court rejected there the quite broad claim that section 6, insofar as it made allottees subject to all state civil and criminal law upon receipt of a fee patent, sanctioned application of state personal property taxes on property owned by Indians within the reservation, state vendor license fees applied against Indians conducting cigarette businesses on reservation land, and state cigarette sales taxes with respect to on-reservation transactions between Indians. 425 U.S. at 480-81. *Moe* is inapposite for several reasons. First, the state appellants in that case were attempting to tax all Indians and not merely allottees, and their reliance on the first sentence in section 6 was accordingly overbroad at best. The petitioner/cross-respondent here seeks to tax lands specifically referred to in the first proviso. Second, as the Court observed, giving literal application to the first sentence proved too much since later legislation had in specific instances, such as criminal jurisdiction, clearly superseded application of state law. No such legislation, however, even tangentially touches upon the proviso's removal of restrictions against taxation of allotted fee-patented lands. Third, and most important, because *Moe* was concerned only with the first sentence in section 6 and because taxation of allotted fee lands was not germane, the Court had no cause to address the proviso. Its general comments concerning the post-allotment period congressional approach to civil regulatory matters can thus hardly be elevated to judicial repeal of

a provision which Congress itself has left unaltered and which was not implicated by the questioned state taxes.¹⁵

"The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); accord *Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association*, 491 U.S. 490, 510 (1989); *Traynor v. Turnage*, 485 U.S.

¹⁵In urging the cross-petition be granted, the United States argued that, "if the principal clause of Section 6 is insufficient to authorize state taxation of Indian property and transactions within a reservation's boundaries ..., it is reasonable to assume that a mere proviso to the principal clause likewise is insufficient to permit state taxation." Brief for the United States as Amicus Curiae at 11. Nevertheless, merely because the "principal clause" might be deemed insufficiently explicit to render such lands taxable when owned by a tribe or its members does not warrant ignoring what the first proviso unequivocally states. The proviso was designed, when viewed in the overall context of the General Allotment Act, as the means for allowing the Secretary to truncate the 25-year trust period and to eliminate any doubt that, once the fee patent issued, the restrictions on alienation, encumbrance and taxation which had existed by virtue of the land's trust status were removed. While included within section 6, the proviso therefore had more direct relevance to section 5, which established the trust period and prohibited, either expressly or impliedly, alienation and taxation during such period. See generally 2A N. Singer, *Statutes and Statutory Construction* § 47.09, at 137-38 (4th ed. 1984) ("The old rule states that the proviso was limited to the section to which it was allocated, or the sections which preceded it. This rule is seldom followed today. Courts have adopted the rule that the proviso will be applied according to the general legislative intent and will limit a single section or the entire act depending on what the legislature intended or what meaning is otherwise indicated. ... No presumption concerning the scope of its application arises from the location of the proviso") (footnotes omitted).

535, 551 (1988). Even though "the standard principles of statutory construction do not have their usual force in cases involving Indian law" (*Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)), there must be at least some textual support in later statutory enactments for implied repeal of an earlier statute.¹⁶ No decisional authority suggests the anomalous concept -- upon which the respondent/cross-petitioner's attack on the property tax is ultimately premised -- that a mere change in general congressional approach, like termination of the allotment process, automatically invalidates all statutory provisions associated with the earlier policy. Absent the necessary textual predicate for implied repeal of section 6's first proviso, the Washington ad valorem tax must be sustained insofar as it has been or will be applied to allotted lands for which the patents have issued, irrespective of whether those lands are owned by the respondent/cross-petitioner or its members. No such textual predicate has been identified here.

¹⁶The Court did not reach the question of implied repeal in *Blackfeet*, holding only that the authorization to tax in the Act of May 29, 1924, 43 Stat. 244 (codified at 25 U.S.C. § 398), did not extend to leases executed under the Omnibus Indian Mineral Leasing Act, Act of May 11, 1938, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g). 471 U.S. at 766-68. It left open the issue whether the later statute, by virtue of its general repealer provision, voided the earlier tax authorization with respect to leases issued under the 1924 Act or the Act of February 28, 1891, 26 Stat. 795 (codified at 25 U.S.C. § 397). 471 U.S. at 767 n.6. The IRA contained no repealer provision, while the Title 18 recodification statute specified those provisions of Title 25, which did not include 25 U.S.C. § 349, repealed or amended by its enactment. Act of June 25, 1948, §§ 3, 21, 62 Stat. 683, 859, 862.

II. THE PLURALITY OPINION IN *BRENDALE* HAS NO RELEVANCE TO THIS MATTER.

There is no dispute among the parties and amici curiae that resolution of the statutory construction issue relating to section 6 should end the inquiry here. *E.g.*, Memorandum of Respondent at 2-3; Brief for the United States as Amicus Curiae at 18. Their agreement in this regard is well founded.

The demonstrably serious impact-test in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 430-31 (1989) (plurality opinion), recognized administrative or judicial recourse for a tribe to vindicate a "protectible interest" allegedly prejudiced by state regulation of nonmember-owned property. As an ordinary matter, however, the interest-balancing standard articulated first in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980), governs when a state attempts to regulate on-reservation affairs of tribes or their members. The interest-balancing standard, in turn, is superseded by the clearly authorized requirement if the regulation involves state taxation of tribal or tribal member property or transactions. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Consequently, if the petitioners/cross-respondents prevail with respect to the section 6 proviso issue, the Washington ad valorem tax may be applied and, if the respondent/cross-petitioner prevails on such issue, the tax will be preempted. In either instance there is no room for *Brendale*-type analysis.

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CONCLUSION

The amici curiae States respectfully request that the Washington ad valorem tax be deemed applicable to all lands allotted pursuant to the General Allotment Act as to which fee patents have issued. They further request that the Court of Appeals' judgment be reversed to the extent it remanded for further evidentiary hearings the question whether application of such tax imperils the respondent/cross-petitioner's political integrity, economic security, health or welfare.

Respectfully submitted,

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

COUNTY OF YAKIMA, et al.,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,

Respondents.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA NATION,

Cross-Petitioners,

v.

COUNTY OF YAKIMA, et al.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE STATE OF WASHINGTON AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS/
CROSS-RESPONDENTS

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QUESTION PRESENTED

Whether Yakima County may impose its ad valorem and real estate excise taxes with respect to real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	(i)
INTEREST OF THE STATE OF WASHINGTON AS AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	
SECTION 6 MAKES IT UNMISTAKABLY CLEAR THAT LANDS ALLOTTED TO INDIANS ARE TO BE SUBJECT TO STATE TAXATION WHEN OWNED IN FEE; AND THAT INTENT WAS NOT CHANGED BY THE INDIAN REOR- GANIZATION ACT	4
A. The Effect of the 1906 Amendment	4
B. The Grand Design of the General Allotment Act	6
C. The Effect of the Indian Reorganization (Wheeler-Howard) Act	7
D. The Aftermath: The Unanimity Continues.....	9
CONCLUSION	14

TABLE OF AUTHORITIES

	<i>Page</i>
CASES	
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	5, 12
<i>In re Heff</i> , 197 U.S. 488 (1905)	5
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973).....	12
<i>Tacoma v. Andrus</i> , 457 F. Supp. 342 (Dist. Ct. D.C. 1978).....	13
<i>United States v. Montana</i> , 450 U.S. 544 (1981).....	6
FEDERAL STATUTES	
General Allotment Act (Act of Feb. 8, 1887, 24 Stat. 390, as amended by Act of May 8, 1906, 34 Stat. 102).....	passim
Section 6 (25 U.S.C. § 349).....	passim
Indian Reorganization Act (Act of June 18, 1934, 48 Stat. 948, codified as 25 USC §§ 461 et seq.)	passim
Section 1	8
Section 2	8
Section 3	8
Section 4	8
Section 5	8, 9, 10, 13
Section 17	12
OTHER AUTHORITIES	
25 C.F.R. Part 151	13
25 C.F.R. § 151.10(e).....	13

TABLE OF AUTHORITIES

	<i>Page</i>
OTHER AUTHORITIES (Continued)	
Solicitor's Opinion, Dec. 24, 1924, 50 I.D. 691, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 138.....	5
Solicitor's Opinion, June 30, 1930, 53 I.D. 133, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 252.....	5
Solicitor's Opinion, August 14, 1934, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 426.....	9
Solicitor's Opinion, December 13, 1934, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 48.....	11
Solicitor's Opinion, December 18, 1934, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 503.....	10
S. 2755, 73d Cong. 2d Sess (1934)	7
H.R. 7902, 73d Cong. 2d Sess (1934)	7
S. Rept. 1998, 59th Cong. 1st Sess., March 23, 1906	5
40 Cong. Rec. 3599 (1906)	5
Readjustment of Indian Affairs: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 Senate Hearings")	7
Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 House Hearings")	7

TABLE OF AUTHORITIES

	<i>Page</i>
OTHER AUTHORITIES (Continued)	
"Memorandum: The Purposes and Operation of the Wheeler-Howard Indian Rights Bill," 1934 House Hearings 15-29	7
Nineteenth Report of the Board of Indian Commissioners (1887)	6
Felix Cohen, <i>Handbook of Federal Indian Law</i> (1942, Univ. of New Mex. Press reprint)	6, 13
Furber, <i>Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War</i> , 14 U. Puget Sound L. Rev. 211 (1991)	7, 8
K. R. Philp, <i>John Collier's Crusade for Indian Reform: 1920-1954</i> (1977, Univ. of Ariz. Press)	7
Wash. Rev. Code § 82.45.060	2
Wash. Rev. Code § 82.45.180	2
Wash. Rev. Code § 84.52.065	2

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BRIEF FOR THE STATE OF WASHINGTON AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS/
CROSS-RESPONDENTS

The State of Washington respectfully submits this brief
in support of the petitioners/cross-respondents, County of
Yakima, et al.

INTEREST OF THE STATE OF WASHINGTON AS
AMICUS CURIAE

The State of Washington contains 24 Indian reserva-
tions in addition to the Yakima Reservation. These other

reservations, like the Yakima Reservation, contain significant amounts of land which are owned in fee by either the Tribe or its members, and which will thus be affected by the outcome of this case. Further, a large portion of the property tax and most of the real estate excise tax are state taxes which, although collected by the county, go into the State general fund, for the support of the public school system. See Wash. Rev. Code § 84.52.065 (property tax) and §§ 82.45.060, .180 (real estate excise tax).

More is involved, however, than this direct financial interest. This case presents a facet of a more general problem, i.e., the extent to which the policies adopted by Congress in the General Allotment Act of 1887 have been modified by subsequent legislation, and the role of the courts in determining the scope and effect of those modifications.

INTRODUCTION AND SUMMARY OF ARGUMENT

We fully concur with the amicus brief of our sister states, Montana, et al. This separate brief is submitted, however, in order to discuss several points regarding the General Allotment Act, the Indian Reorganization Act, and the relationship between the two.

1. Section 6 of the General Allotment Act, both in its original wording in 1887 and after its amendment in 1906, is unmistakably clear: lands for which reservation Indians receive a fee patent are taxable. Indeed, the 1906 amendment made even more clear the congressional intent which the Court had found, in that same year, to be implicit in the very concept and purpose of a fee patent, i.e., that alienability of land and its taxability were to go together. Thus, the basic issue now presented to the Court does not involve any serious question about the intent of Congress in 1887 or 1906 to allow fee lands to be taxed. Rather, it involves the question of whether Congress has changed that intent since then. For decades, state and local governments throughout the country have been taxing fee land in response to the clear directions of the General Allotment Act. Did Congress ever say to them: "Stop; we have changed our mind"? If so,

when? And how? It certainly did not do so in 1934, when it passed the Act we here examine, the Indian Reorganization Act.

2. In that 1934 Act, to be sure, Congress changed its mind about major elements of the policies it had adopted in the General Allotment Act. Those previous policies or broader goals looked to the eventual elimination of reservations, of tribal governments, and of all the immunities of Indians from state law. They looked as well to elimination of federal supervision over Indians, the conferral of citizenship upon them—with the consequent right to all benefits of state and local governmental programs—and the conferral of the right to manage their own property. The aim was complete integration, legally and socially. The General Allotment Act set up a process designed to attain these broader goals, and that process would be triggered by the issuance of fee patents to tribal members.

In adopting the Indian Reorganization Act in 1934, Congress arrested that process, and thereby repudiated major elements of those policies and broader goals, to leave us with the system of partial integration which exists today. But there is no reason to think Congress repudiated as well its clear intent that fee lands should be taxable. Along with others, that part of the original package of policies remained.

3. That the taxability of fee land was not affected by the Indian Reorganization Act becomes especially clear from examining the position taken shortly after the Act's passage by the legal team in the Department of Interior which had put that Act together, Nathan Margold, the Department Solicitor, and his assistants Charles Fahy, and—most importantly—Felix Cohen. They were not only present at the creation of modern Indian policy, as embodied in the Indian Reorganization Act and its early implementation; they, along with Commissioner John Collier, were in large part the creators. And their consistent position after passage of the Act is that the taxability of fee land remains.

ARGUMENT

SECTION 6 MAKES IT UNMISTAKABLY CLEAR THAT LANDS ALLOTTED TO INDIANS ARE TO BE SUBJECT TO STATE TAXATION WHEN OWNED IN FEE; AND THAT INTENT WAS NOT CHANGED BY THE INDIAN REORGANIZATION ACT.

A. The Effect of the 1906 Amendment

There is no need to retrace the complete unanimity which has existed until now between the Courts and the Executive Branch on the basic question: Does § 6 constitute Congressional consent to taxation of Indian-owned fee land?¹ The amicus brief of our sister states fully covers this fundamental point, and shows the answer to be a long and unvarying "yes." We would anticipate, however, a possible suggestion that the reference, in the first proviso of the 1906 amendment of § 6, to the removal of "all restrictions as to the sale, incumbrance, or taxation of said land" upon issuance of a fee patent should now be confined in its application. The suggestion would be that this policy of removing restrictions on state taxation should be applied only when the fee patent has been issued on an accelerated basis pur-

¹Section 6 of the General Allotment Act (Act of Feb. 8, 1887, 24 Stat. 390) as amended by the Act of May 8, 1906 (34 Stat. 102), codified as 25 U.S.C. § 349, reads as follows:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

suant to the proviso, i.e., before the expiration of the full 25-year trust period.

Any such suggestion, however, would be entirely misplaced. It would impute to Congress an intent to create two types of fee land: taxable fee land if the trust period had been shortened, and non-taxable land if the trust period had not. No such distinction has ever been recognized; compare, for example, Solicitor's Opinion, Dec. 24, 1924, 50 I.D. 691, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 138 (land taxable upon issuance of fee patent after a shortened trust period) and Solicitor's Opinion, June 30, 1930, 53 I.D. 133, 1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 252 (land taxable upon issuance of fee patent after the full 25-year trust period). Lastly, any such distinction flies in the face of the legislative history of the 1906 amendment to § 6. That amendment made two, and only two, changes. First, it provided that Indian allottees would become citizens only upon issuance of a fee patent, not upon issuance of a trust patent—thereby effectively overruling *In re Heff*, 197 U.S. 488 (1905). Second, it provided that a fee patent could be issued before expiration of the full 25-year trust period if the Secretary of Interior deemed it appropriate in individual cases. See S. Rept. 1998, 59th Cong., 1st Sess., March 23, 1906, and 40 Cong. Rec. 3599 (1906) (remarks of Rep. Burke).

In short, there is simply no basis for now fracturing the unanimity which has so long prevailed: all fee land is to be taxed alike. The language in the proviso removing restrictions on taxation simply made explicit what the Court shortly found to have been implicit in the very concept of a fee patent: removal of restrictions on alienation implies removal of immunity from taxation. See *Goudy v. Meath*, 203 U.S. 146, 149 (1906).²

²As stated in *Goudy*: "... the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases while at the same time releasing it from taxation ..." 203 U.S. at 149.

B. The Grand Design of the General Allotment Act

This linking of alienability and taxability, however, was only a part of the total grand design envisioned by proponents of the General Allotment Act. We need only note very briefly its major features.

That grand design might be thought of as involving a two-step process. First, the issuance of a fee patent conferred upon the allottee not only the right to manage and dispose of his land as he saw fit, free from governmental controls, but also full citizenship; and, along with all other citizens, the allottee was to "... have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which [the allottee] may reside." (Section 6) Second, this change in legal status on the level of the individual allottee was to result in the general disintegration and eventual disappearance of tribal governments and reservations, and the complete legal and social integration of Indians into the general population. See *United States v. Montana*, 450 U.S. 544, 549, n 9 (1981). Indeed, the Indian Bureau itself was to disappear as well from the legal and administrative landscape. In the colorful analogy of Senator Dawes, the principal proponent of the grand design:

It seems to me that this is a self-acting machine that we have set going, and if we only run it on the track it will work itself all out, and all these difficulties that have troubled my friend will pass away like snow in the spring time, and we will never know when they go; we will only know they are gone.³

And again:

Suppose these Indians become citizens of the United States with this 160 acres of land to their sole use, what becomes of the Indian reservations, what becomes of the Indian Bureau, what becomes of all this machinery, what becomes of the six commissioners appointed for life? Their occupation is gone; they have all vanished; the work for which they have been created *

³Nineteenth report of the Board of Indian Commissioners (1887), 54; quoted in Felix Cohen, *Handbook of Federal Indian Law* (1942, Univ. of New Mex. Press reprint) 210.

* * is all gone, while you are making them citizens * *
* That is why I don't trouble myself at all about how to change it [the machinery of administration].⁴

Senator Dawes' grand design, however, did not see fruition. The "self-acting machine" was not allowed to continue to "run on the track." The Indian Reorganization Act halted it.

C. The Effect of the Indian Reorganization (Wheeler-Howard) Act

John Collier, appointed as Commissioner of Indian Affairs in 1933, quickly set out to halt the allotment process and to undo its major effects. In this task, he was aided by Nathan Margold, Solicitor for the Interior Department, and Margold's assistants, Felix Cohen and Charles Fahy.⁵ Their efforts produced the original version of the Indian Reorganization Act, which was introduced in both the Senate and the House as administrative requests. See S. 2755, 73d Cong. 2d Sess. (1934) and H.R. 7902, 73d Cong. 2d Sess. (1934).⁶

In a memorandum submitted by Commissioner Collier to the Senate and House Committees on the introduction of these bills, he detailed the destructive effects of the allotment system, especially the loss of the Indian land base. See "Memorandum: The Purposes and Operation of the Wheeler-Howard Indian Rights Bill," 1934 House Hearings, 15-29. Yet he stated in that same memorandum: "The bill does not disturb, but expressly safeguards and preserves, every

⁴Ibid., 55.

⁵See K. R. Philp, *John Collier's Crusade for Indian Reform: 1920-1954* (1977, Univ. of Ariz. Press) 140.

⁶For the legislative history of these two bills, see generally Readjustment of Indian Affairs: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 Senate Hearings") and Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess. (1934) ("1934 House Hearings"). For the most detailed review of this legislative history to date, see Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 239-260 (1991).

vested right which has accrued through the workings of allotment." *Ibid.*, at 19.

There is no need here to analyze all of the many changes which Commissioner Collier's original proposal underwent in the face of severe opposition from the Senate and House Committees on Indian Affairs and from various Indian groups as well.⁷ Rather, we shall briefly examine the major provisions of the Act which finally emerged (Act of June 18, 1934, 48 Stat. 948, codified as 25 U.S.C. §§ 461 et seq.), in order to see just what they did, and did not do. Section 1 stopped any further allotments, on all Indian reservations. Section 2 extended indefinitely "the existing periods of trust placed upon any Indian lands and any restrictions on alienation thereof . . .". These two sections were the heart of the Act, and together froze the status quo. The machine of Senator Dawes was stopped on the track, and his grand design doomed to frustration. Tribes and reservations were no longer destined to go out of existence through continuation of the allotment system.

Section 3 authorized the Secretary of Interior to restore to tribal ownership any remaining surplus reservation lands which had previously been available for sale. Section 4 prohibited the sale or transfer of any restricted Indian lands, unless the transferee was the Tribe or unless land of equal value was obtained in exchange. Section 5 authorized the Secretary to acquire for Indians lands or interests therein "through purchase, relinquishment, gift, exchange or assignment" and authorized an appropriation of \$2 million for such acquisitions. Such lands were to be taken into trust and would be exempt from state and local taxation.

Sections 3 and 4, like §§ 1 and 2, were, in effect, freezing the status quo, while § 5, in contrast, provided a mechanism for restoring the pre-1887 situation to some extent, through reacquisition of lands for the Indians, on a parcel-

⁷For a discussion of these changes, and the opposition which prompted them, see *Two Promises, Two Propositions*, supra, 240-252, which focuses on the opposition from Congress, and Philp, op. cit., 135-161, which focuses on the opposition from Indian groups.

by-parcel basis. Except for acquisitions made under § 5, all fee land, whether owned by Indians or non-Indians, was to be left intact.

These five sections constitute, we suggest, the much-discussed repudiation of the allotment system. But none of them is the least bit incompatible with § 6 of the General Allotment Act. The Act leaves § 6 untouched.

D. The Aftermath: The Unanimity Continues

After passage of the Indian Reorganization Act, what were the views of the Interior Department regarding the continuing vitality of § 6 of the General Allotment Act and the taxability of fee lands? Because the legal staff of the Department, including Felix Cohen, had been involved in the drafting of the Indian Reorganization Act from beginning to end, their initial interpretations take on special importance.

Less than two months after passage of the Act, the question arose as to whether it prohibited further issuance of certificates of competency and fee patents. In a memorandum to Commissioner Collier, dated August 14, 1934, Solicitor Margold gave an unequivocal "no." He stated:

I do not see any room for doubt or argument on the question whether the Wheeler-Howard Act forbids the granting of fee patents. Early drafts of the bill prepared in this Office specifically prohibited the granting of fee patents in the following terms:

"The authority of the Secretary of the Interior to issue to Indians patents in fee or certificates of competency or otherwise to remove the restrictions on land allotted to individual Indians under any law or treaty is hereby revoked."

This specific prohibition was deliberately struck out at a hearing of the Subcommittee of the Senate Committee on Indian Affairs appointed to study the Wheeler-Howard Bill. It was struck out at the suggestion of Senator Wheeler, who declared, in substance, that it would be monstrous to deprive the Secretary of the Interior of discretion to release Indians of the standing of Mr. Curtis from restrictions on alienation.

At this time, you consented to Senator Wheeler's suggestion. I can see no reason for questioning now the effect of this deliberate omission. The memorandum of Mr. Reeves offers no argument for any other construction than the one thus confirmed by the history of the legislation.

I agree with your suggestion that, under the circumstances, the sweeping attempt in Section 4 to prohibit alienations of restricted Indian land is largely meaningless, and that the original purpose of the statute in this, as in several other respects, has not been achieved. The remedy for this, in my judgment, is amendatory legislation, rather than arbitrary interpretation of the legislation already secured which may be overthrown by a contrary construction on the part of a future Administration.

1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 426.

Thus § 6 of the General Allotment Act was still operative. But was its linking of alienability and taxability still operative as well? Or had the Indian Reorganization Act impliedly severed that link? Solicitor Margold clearly thought it had not been severed.

In another memorandum to the Commissioner, dated December 18, 1934, he considered the question of whether § 5 of the Indian Reorganization Act allows the United States to take fee land into trust for the purpose of avoiding taxation. The memorandum begins:

The attached letter is returned to you for further consideration. The letter in effect holds that an Indian owning taxable land may convey such land to the United States to be held in trust for the individual Indian. Obviously this is a matter which will affect large numbers of Indians other than the particular applicant referred to in the attached communication.

1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs, 503.

After quoting the language of § 5, Mr. Margold continues:

It is questionable, from a strictly legal point of

view, whether such a transaction as that referred to falls within the declared purpose "of providing land for Indians." Aside from the narrow question of legality, it is believed that a matter of this sort should receive further consideration as to the policy involved than has apparently been given to the attached communication. Is it the intention of the Indian Office to eliminate taxation on all Indian lands now taxable? If not, by what criterion does the Indian Office propose to determine when an Indian owner of taxable land may avoid taxation through a transfer of the land to the United States Government followed by the receipt of a trust patent? Ibid. at 504.

Solicitor Margold's strong concerns would make no sense whatsoever if he believed the Indian Reorganization Act had somehow cut the link between alienability, pursuant to a fee patent, and taxability.

Yet a third opinion of Solicitor Margold should be examined. In an opinion to the Secretary of Interior dated December 13, 1934, he considered twelve questions relating to the Indian Reorganization Act. Question ten was as follows:

Can land on the local tax rolls be relieved of the burden of local taxation when it is acquired by an organized tribe or tribal corporation, title being taken by the tribe or tribal corporation?

1 Op. Solicitor of Dept. of Int. Relating to Indian Affairs 489, at 491.

The transaction in question, unlike the transaction involved in the December 18, 1934 memorandum discussed previously, did not contemplate putting the land into trust status.

At no point does the opinion suggest that fee land acquired by the Tribe can be relieved of taxation simply because it is within a reservation. Rather, the opinion sets out only two conditions which would result in the tribally acquired land becoming tax-exempt. First, the land would be exempt if the Tribe would, "upon the circumstances of the particular case," be considered a Federal instrumentality. That expansive view of intergovernmental tax immunity

has, of course, since been discarded. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, at 150-152 (1973). Second, the opinion pointed out that a Tribe which had received a charter under § 17 of the Indian Reorganization Act was authorized to "... purchase ... and dispose of property of every description ... but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any land ..." within the reservation. (This provision, we should note, puts no such restriction on the Yakima Nation since it has no such charter.)

The opinion reads this limitation on selling, mortgaging, or leasing tribally owned land as a limitation on taxation, by reasoning as follows:

So it may be said, in the case under consideration, that it would be an exceedingly narrow construction of a provision which should receive liberal interpretation to hold that lands within an Indian reservation may not be sold by an incorporated tribe but may be sold on behalf of the tribe at a tax sale.

In the converse situation, where the power to sell Indian lands was granted by statute to certain Indians, the Supreme Court held that voluntary and involuntary alienation were so closely linked as to indicate the intent of Congress to permit State taxation. The court declared:

"It requires a technical and narrow construction to hold that involuntary alienation continues to be forbidden while the power of voluntary alienation is granted * * *." (*Goudy v. Meath*, 203 U.S. 146, 150).

Ibid. at 492.

Thus, far from finding that the Indian Reorganization Act has somehow cut the link between alienability and taxability, the opinion confirms that link, and indeed relies upon the very case which established the link in the first place, *Goudy v. Meath*.

Solicitor Margold's assistant, Felix Cohen, is equally clear in confirming the link. As he stated in his 1942 treatise: "Should he [the Indian allottee], on the other hand, ap-

ply for the issuance of a fee patent and be accorded one pursuant to law, there seems to be no reason to believe that his lands would not thereby become subject to state taxation."⁸

If there were any reason to believe otherwise, Felix Cohen, we suggest, would have been the person to have found it. Further, although federal Indian policy has swung back and forth, like a pendulum, it never swings completely back. Important elements and effects of the previous policy always remain. Solicitor Margold and Felix Cohen, we suggest, realized that, and recognized as well that the linking of alienability and taxability of land, as embodied in § 6 of the General Allotment Act, was one of those remaining elements.

Finally, a word regarding the future practical consequences of rejecting the position taken by Solicitor Margold's opinions and Cohen's treatise, and thereby breaking that link. As we have seen, Solicitor Margold expressed some doubts, in his December 18, 1934 memorandum, as to whether § 5 of the Indian Reorganization Act authorized taking Indian-owned fee land into trust status for the purpose of avoiding state taxes. Some 44 years later, that question was answered in *Tacoma v. Andrus*, 457 F. Supp. 342 (Dist. Ct. D.C. 1978); the district court held that § 5 granted such authority. The dispute involved three tracts of land located within the Puyallup Reservation and within the City of Tacoma. See *Tacoma v. Andrus*, 457 F. Supp. at 344. In apparent response to that decision, the Interior Department adopted, in 1980, policy guidelines for such transfers into trust status, as Solicitor Margold had originally suggested in his December 18, 1934 memorandum. See 25 C.F.R. Part 151. Among the factors to be considered in evaluating requests for transfer into trust is the following: "If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting

⁸Cohen, op. cit., at 259.

from the removal of the land from the tax rolls;" 25 C.F.R. § 151.10(e).

For land within a reservation, such as the land involved in *Tacoma v. Andrus*, consideration of this factor makes no sense whatsoever if Indian-owned fee land is automatically tax exempt in any case. Further, these regulations give the affected governmental units an opportunity to challenge such proposed transfers into trust and thus an opportunity to prevent the consequent erosion of the tax base. (The practice of the Interior Department, fortunately, has been to notify governmental units of any proposed transfers.)

If the link between fee status and taxability is broken by the Court, even this last administrative protection will be removed. Tribes and individual Indians would be perfectly free to buy up large amounts of otherwise taxable land and, by the mere fact of Indian ownership, to remove them from the tax base. And the administrative protections embodied in these regulations will be, in effect, nullified.

CONCLUSION

For the reasons given above, the Court should uphold the taxability of all fee lands within the Yakima Reservation, and reverse the judgment of the Court of Appeals to the extent it is inconsistent with that holding.

Respectfully submitted,

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In The
Supreme Court of the United States

October Term, 1991

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,

Respondent.

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION,

v.

Cross-Petitioner,

COUNTY OF YAKIMA and DALE A. GRAY,
Yakima County Treasurer,

Cross-Respondents.

On Writs Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE MASHANTUCKET
PEQUOT TRIBE, ASSINIBOINE AND SIOUX TRIBE OF
THE FORT PECK RESERVATION, BLACKFEET TRIBE OF
THE BLACKFEET RESERVATION, CHEROKEE NATION
OF OKLAHOMA, CHEYENNE RIVER SIOUX TRIBE,
(additional amici listed inside)
IN SUPPORT OF RESPONDENT/CROSS-PETITIONER
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OF THE YAKIMA INDIAN NATION

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Skokomish Tribe,
Squaxin Island Tribe,
Turtle Mountain Band of Chippewa Indians, and
National Congress of American Indians

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT.....	2
I. STATES AND THEIR POLITICAL SUBDIVISIONS CANNOT TAX INDIAN FEE LANDS AND ACTIVITIES WITHIN A RESERVATION WITHOUT EXPRESS AUTHORIZATION FROM CONGRESS: NO SUCH AUTHORIZATION EXISTS HERE	3
A. Under This Court's <i>Per Se</i> Rule, Tribal Barriers To State Taxation Can Only Be Abrogated In Unmistakably Clear Terms	3
B. The Burke Act Proviso Authorized The Removal Of An Allottee's Individual Right To Tax Immunity, But Had No Effect On The Tribe's Right To Exclusive Jurisdiction Over Its Members And Their Fee Lands Within A Reservation	5
II. THE IMPOSITION OF THE COUNTY TAXES AT ISSUE HERE IS INCONSISTENT WITH CONGRESSIONAL GOALS OF TRIBAL SELF-GOVERNMENT AND ECONOMIC SELF-SUFFICIENCY THAT HAVE BEEN THE CENTRAL FOCUS OF FEDERAL INDIAN POLICY SINCE THE 1930s	10
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
Battese v. Apache County, 630 P.2d 1027 (Ariz. 1981).....	8
Bryan v. Itasca County, 426 U.S. 373 (1976).....	4, 8
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).....	3, 4, 9
Choate v. Trapp, 224 U.S. 665 (1912).....	7
DeCoteau v. District County Court, 420 U.S. 425 (1975).....	9
Goudy v. Meath, 203 U.S. 106 (1906).....	8
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867).....	7
Matter of Heff, 197 U.S. 488 (1905).....	8
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).....	4
Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976).....	4, 6, 7, 8, 13
Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985).....	4
Morton v. Mancari, 417 U.S. 535 (1974).....	10
Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. ___, 111 S.Ct. 905 (1991).....	3, 4
Solem v. Bartlett, 465 U.S. 463 (1984).....	6
United States v. Mitchell, 445 U.S. 535 (1980).....	6
United States v. Montana, 450 U.S. 544 (1981).....	6

TABLE OF AUTHORITIES - Continued

	Page
United States v. Nice, 241 U.S. 591 (1916).....	8
United States v. Sandoval, 228 U.S. 243 (1913).....	9
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).....	3, 4
Williams v. Lee, 358 U.S. 217 (1959).....	3
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).....	4
STATUTES	
24 Stat. 388, General Allotment Act of 1887 ("GAA"), 25 U.S.C. §§ 331-334, 339, 341, 348, 349, 354, 381.....	2, 5, 6, 7
34 Stat. 182, Burke Act of May 8, 1906.....	2, 9
18 U.S.C. § 1151(a).....	9
25 U.S.C. §§ 450-450n, the Indian Self-Determination and Education Assistance Act of 1975.....	11
25 U.S.C. §§ 461-479, the Indian Reorganization Act of 1934.....	10
25 U.S.C. §§ 1451-1543, the Indian Financing Act of 1974.....	11
25 U.S.C. §§ 1901-1963, the Indian Child Welfare Act of 1978.....	11
25 U.S.C. §§ 2201-2211, the Indian Land Consolidation Act of 1983.....	11
25 U.S.C. § 2401(12).....	13
25 U.S.C. §§ 2701(4), 2703(4), the Indian Gaming Regulatory Act of 1988.....	12

TABLE OF AUTHORITIES - Continued

Page

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News 2873 13

Hearings on S. 2755 and S. 3645 Before the Senate
Comm. on Indian Affairs, 73d Cong., 2d Sess.
(1934) 10

78 Cong. Rec. (Part II) 11727, S3645 (daily ed. July
15, 1934) 11

EXECUTIVE MATERIALS

Presidential Statement of June 14, 1991 (George
Bush) 12

Special Message to Congress on Indian Affairs
[1970], Pub. Papers 564, 565-566 (Richard M.
Nixon) 11

Nevada Op. Att'y Gen. 88-19 (1989)..... 8

North Dakota Op. Att'y Gen. 85-12 (1985)..... 8

Oregon Op. Att'y Gen. 83-15 (1983)..... 8

MISCELLANEOUS

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INTEREST OF THE AMICI CURIAE

*Amici curiae*¹ are fifteen (15) federally-recognized Indian tribes and one national Indian-interest organiza-
tion.² All of the *amici* tribes have governing bodies and
exercise jurisdiction over their tribal territory including
land owned by their members. *Amici* have a substantial
interest in the issues raised in this case. The County of
Yakima is attempting to tax on-reservation lands owned
in fee by the Yakima Indian Tribe and individual tribal
members, and Indian activities related to those lands.
Such taxation would be a significant infringement upon
amici tribes' right to govern their members and territory.

In addition, such taxation likely will further diminish
the land base of Indian people. Through the policies
carried out under the General Allotment Act of 1887,
tribes lost almost 90 million acres of land. They cannot
afford to lose any more. Indeed, tribes today are striving
to enlarge their land base and preserve their precious
remaining resources. These efforts are supported by fed-
eral policies which encourage tribal self-determination
and economic self-sufficiency.

¹ Counsel for Petitioners and counsel for Respondents
have consented to the filing of the brief of *amici* in support of
the Respondent/Cross-Petitioner, Confederated Tribes and
Bands of the Yakima Indian Nation. The consents are submit-
ted for filing herewith.

² The National Congress of American Indians is a private,
non-profit organization established in 1944. It is the oldest and
largest Indian membership organization.

Amici submit the attached brief to urge the Court to find that the County taxes at issue here are inapplicable.

SUMMARY OF ARGUMENT

Absent congressional authorization, states or their political subdivisions cannot tax Indian lands or activities within Indian reservations. Before state taxation is permitted, Congress must manifest its intent to override the federally-acknowledged tribal barriers to such state taxation in unmistakably clear terms. This rule is founded upon the doctrines of tribal sovereignty and federal preemption which protect tribal rights to self-government and the concomitant right to be free from state jurisdiction over their members within their territories.

The Burke Act proviso of the General Allotment Act of 1887, upon which the County here relies for its authority to tax reservation Indian fee lands and activities, does not even address these tribal barriers, much less override them. The proviso's reach is limited. It merely permits, *inter alia*, the removal of an individual Indian allottee's immunity from state property taxes through the issuance of a valid fee patent.

State taxation of Indian fee lands will likely lead to the loss of land and result in aggravating the poverty now existing on Indian reservations. The County's taxes should be struck down as inconsistent with congressional policy which encourages the rebuilding of tribal land bases and tribal economies.

I. STATES AND THEIR POLITICAL SUBDIVISIONS CANNOT TAX INDIAN FEE LANDS AND ACTIVITIES WITHIN A RESERVATION WITHOUT EXPRESS AUTHORIZATION FROM CONGRESS: NO SUCH AUTHORIZATION EXISTS HERE.

A. Under This Court's *Per Se* Rule, Tribal Barriers To State Taxation Can Only Be Abrogated In Unmistakably Clear Terms.

This case involves an attempt by the County of Yakima ("the County") to assert taxing jurisdiction over Indian fee lands and activities within an Indian reservation. The County's claim must be rejected because federal law prohibits such jurisdiction by a state or its political subdivisions.

Generally, absent express congressional authorization, states have no authority over Indians within their reservations.³ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-142 (1980); *Williams v. Lee*, 358 U.S. 217, 220 (1959). This rule is even stronger when dealing with state jurisdiction to tax. "In the special area of state taxation of Indian tribes and members, [the Court] has adopted a *per se* rule" against state jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) ("*Cabazon*").⁴

³ While this case involves Indian fee land within a reservation, reservation status is not the only source of tribal barriers to state taxation. See, e.g., *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. ___, 111 S.Ct. 905 (1991).

⁴ The County concedes the applicability to this case of the general rule that states cannot tax Indians within their reservations absent express congressional consent. County Op. Br. at 9.

The *per se* rule articulated in *Cabazon* is the culmination of a long line of this Court's decisions recognizing tribal sovereignty and federal preemption as barriers to state taxing jurisdiction over tribal Indians and their lands (hereinafter "tribal barriers"). E.g., *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142-143; *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976) ("Moe"); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); accord *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. ___, 111 S.Ct. 905 (1991) ("Potawatomi"); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The corollary of the *per se* rule is that while Congress can override the tribal barriers to state taxation, it must do so in "unmistakably clear" terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 765. Therefore, before the County can tax Indian fee lands or activities on a reservation, it must show in unmistakably clear terms that Congress intended to abrogate tribal barriers to state jurisdiction. The alleged congressional authorization proffered by the County here does not address, much less overcome, these tribal barriers.

B. The Burke Act Proviso Authorized The Removal Of An Allottee's Individual Right To Tax Immunity, But Had No Effect On The Tribe's Right To Exclusive Jurisdiction Over Its Members And Their Fee Lands Within A Reservation.

The County relies upon the proviso of the Burke Act for its taxing authority.⁵ 25 U.S.C. § 349. The Burke Act is an amendment of the General Allotment Act of 1887 ("GAA").⁶ As will be explained, the Burke Act has one provision addressed to removal of the tribal barriers to state jurisdiction and one provision addressed to removal of the barrier erected by virtue of the trust status of the allotments. The County relies upon the latter provision to remove the tribal barriers. This it cannot do.

⁵ The Burke Act is set out in pertinent part below. The proviso relied upon by the County is italicized.

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside; . . . *Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .*

Act of May 8, 1906, 34 Stat. 182, codified at 25 U.S.C. § 349.

⁶ 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 348, 349, 354, 381.

At the time the GAA was enacted, tribes had been placed on reservations through treaties, agreements, and statutes. See generally F. Cohen, *Handbook of Federal Indian Law* 127-139 (1982 ed.). Under the reservation system, the tribes held their lands in common. Rapid westward expansion and population growth led to increased demands by non-Indians for Indian lands and resources.

The GAA addressed both the assimilation of the Indian and the white settlers' demands for land. Congress believed that as individual landholders, Indians would require less land than in their tribal status. Thus, many reservations were allotted in severalty to individual Indians, after which the surplus lands not needed for allotment were made available to white settlers. See *Solem v. Bartlett*, 465 U.S. 463, 466-468 (1984).

The federal government held the allotments in trust for the individual Indian allottees for a period of twenty-five years. 25 U.S.C. § 348. During the trust period, the lands could not be alienated and were immune from state taxation. See *United States v. Mitchell*, 445 U.S. 535, 544 (1980). This was considered necessary to allow the individual Indians time to adjust to the demands of the dominant society and the eventual responsibilities of citizenship. *Id.* After the expiration of the trust period, a fee patent to the land would be issued to individual Indians. 25 U.S.C. § 349. When all the lands had been allotted and the trust periods had expired, the reservations could be abolished. *Moe*, 425 U.S. at 479. The abolishment of the reservations and tribal governments were the long-range goals of the GAA. See *United States v. Montana*, 450 U.S. 544, 559 n.9 (1981). These goals were to be accomplished gradually through a multi-step process. *Id.*

The trust status of the allotments provided an individually-held protection for the allottees. In *Choate v. Trapp*, 224 U.S. 665 (1912), this Court recognized that the immunity from state taxation of allotted trust land is a constitutionally-protected property interest that is vested in individual tribal members.

[T]he provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon [the state].

224 U.S. at 673, citing *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1867).

In the present case, the Burke Act proviso authorizes the removal only of this individual right to be immune from state property taxes. The proviso does not address the tribal barriers to state jurisdiction. These barriers are addressed in another part of the Burke Act, the first sentence, which provides:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they may reside. . . .

25 U.S.C. § 349.

This was the language of the Burke Act involved in *Moe*, and *Moe* made clear that this language relates to the

tribal barriers to state jurisdiction.⁷ Indeed, *Moe* affirmed that the tribal barriers to state taxing jurisdiction were not abrogated under that language. *Moe*, 425 U.S. at 478-479. See also *Bryan v. Itasca County*, 426 U.S. at 386. Thus, under *Moe*, the tribal barriers to state jurisdiction survive the Burke Act.

Significantly, several states share *amici's* view that the tribal barriers to state jurisdiction over tribal and individual Indian fee lands within reservations have never been abrogated. See, e.g., Oregon Op. Att'y Gen. 83-15 (1983); Nevada Op. Att'y Gen. 88-19 (1989); North Dakota Op. Att'y Gen. 85-12 (1985); *Battese v. Apache County*, 630 P.2d 1027 (Ariz. 1981).

Finally, since the allotment era, Congress has confirmed that fee lands within an Indian reservation are "Indian Country" subject to federal, not state jurisdiction. In 1948, Congress enacted the Indian Country statute, defining "Indian Country," in pertinent part, as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United

⁷ In the present case, the County relies on the holding in *Goudy v. Meath*, 203 U.S. 106 (1906), that this language authorized state taxation of Indian fee lands within reservations, for its authority to tax. The County's reliance is misplaced. *Goudy* involved an Indian who had severed his tribal relations; a fact not present in the instant case in which the tribal members have maintained deeply rooted relations with the tribe. Moreover, in *Moe*, the Court rejected the argument that *Goudy* authorized the state to tax tribal Indians within a reservation based on this language. 425 U.S. at 477. *Goudy* itself was premised on *Matter of Heff*, 197 U.S. 488 (1905), which was overruled in *United States v. Nice*, 241 U.S. 591 (1916).

States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151(a) (emphasis added).

This definition expressly encompasses Indian fee patents within an Indian reservation.⁸ Section 1151(a) was a codification of pre-existing case law establishing that federal jurisdiction over Indian fee lands is paramount, and that state jurisdiction is excluded. See, e.g., *United States v. Sandoval*, 228 U.S. 243 (1913). This Court subsequently has noted that the Indian Country statute provides protection to tribal governments as well because under it, tribal jurisdiction is coextensive with federal jurisdiction. *Cabazon*, 480 U.S. at 207 n.5, citing *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

Under this Court's *per se* rule, tribal barriers to state taxation can only be abrogated in unmistakably clear terms. The Burke Act proviso relied upon by the County for its authority to tax reservation Indians and activities removed the individual allottee's right to tax immunity upon issuance of a valid fee patent, but has no effect on the tribe's right to exclusive jurisdiction over its members and their fee lands within a reservation. Therefore, the County has no authority to impose the taxes at issue here.

⁸ See also the Indian Gaming Regulation Act of 1988, 25 U.S.C. § 2703(4) (defining "Indian lands" to include "all lands within the limits of any Indian reservation").

II. THE IMPOSITION OF THE COUNTY TAXES AT ISSUE HERE IS INCONSISTENT WITH CONGRESSIONAL GOALS OF TRIBAL SELF-GOVERNMENT AND ECONOMIC SELF-SUFFICIENCY THAT HAVE BEEN THE CENTRAL FOCUS OF FEDERAL INDIAN POLICY SINCE THE 1930s.

Today, strengthening Indian tribes and their resources is the focal point for federal Indian policy. Beginning with the *Meriam Report*⁹ in the 1920's, and continuing to the present, congressional policy has emphasized tribal governments and landholdings as a means of tribal self-determination and economic self-sufficiency. This policy was formally instituted with the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 ("IRA").

In enacting the IRA, Congress clearly connected Indian ownership of land and Indian economic survival. Congress' foremost concerns were to improve the economic situation of Indians by stopping further land loss through allotments, and to revitalize tribal governments. Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. (1934). "The overriding purpose of the [IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

⁹ Institute for Government Research, *The Problem of Indian Administration* (L. Meriam ed. 1928).

The prime sponsor of the IRA, Representative Howard, recognized that loss of land through the GAA produced widespread poverty among reservation Indians. 78 Cong. Rec. (Part II) 11727, S3645 (daily ed. July 15, 1934). Thus in enacting the IRA, Congress preserved the remaining lands to tribes and their members, supported the acquisition of new lands for what had become the "landless" Indians, and provided a framework whereby tribes exercised a stronger role in governing their members and resources.

Strengthening tribal governance has been the emphasis of virtually every major piece of federal legislation since the IRA addressing the status of tribes and programs for their benefit.¹⁰ E.g., the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963; and the Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2201-2211. This Court recently noted that: "These Acts reflect Congress' desire to promote the 'goal of Indian self-government, including its 'overriding' goal of encouraging tribal self-sufficiency and economic development.'" *Potawatomi*, 111

¹⁰ The single exception to this was the federal government's disastrous experiment during the 1950's with the now thoroughly repudiated policy of Termination. President Richard Nixon renounced the Termination policy because it ignored the moral and legal obligations involved in the special relationship between tribes and the federal government. Special Message to Congress on Indian Affairs, [1970], Pub. Papers 564, 565-566 (Richard M. Nixon).

S.Ct. at 910. Most recently, Congress unequivocally declared that, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." The Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4).

These policies and goals concerning Indians are shared by the Executive Branch. This year, President George Bush issued a policy statement reaffirming the government-to-government relationship between the federal government and Indian tribes. The President noted that, "the concepts of forced termination and excessive dependency on the Federal Government must now be relegated, once and for all, to the history books [as] we move forward toward a permanent relationship of understanding and trust. . . ." Presidential Statement of June 14, 1991. More specifically, the federal government is publicly advocating its view that the County taxes in this case are unauthorized and inconsistent with federal Indian policy. See Brief of United States as *Amicus Curiae* in this case.¹¹

In the midst of firmly established federal protections insulating reservation Indians from state taxation, including comprehensive legislation preserving Indian lands and promoting tribal communities, the County should not be allowed to impose its taxes. The result of such an imposition would be to render many reservation Indians landless once again – the very consequence these policies and goals are meant to prevent from occurring. Indeed, as

¹¹ This is consistent with previous opinions of the Solicitor General of the Department of the Interior on this issue. See, e.g., BIA.PN.1641, March 15, 1990; BIA.IA.0389, May 25, 1984.

tribes and their members struggle to overcome the long and difficult history of dependency and economic privation, their remaining land is the keystone to realizing a future determined by their own efforts.

There is yet another reason to reject the result argued for by the County here. It would be a bitter irony for this Court to stay the hand of the State from applying personal property taxes on automobiles or sales taxes on cigarettes to reservation tribal members based on the language of the Burke Act at issue in *Moe*, but then to conclude that the even less compelling language from that same section allows the County to apply its real property taxes to Indian-owned fee lands within reservations.

Finally, *Amici Curiae* counties bemoan the potential loss of revenue to be collected from Indian and tribal owners of fee lands. Brief of the Washington State Association of Counties at 6-9. But who are these delinquent taxpayers? They are Indian people, the poorest of the poor by every means and measure. In 1974, Congress noted that "[a]ll the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today there is almost a total lack of an economic community." H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 2, reprinted in 1974 U.S. Code Cong. & Admin. News 2873, 2874. Once their land is gone, these landless people will appear on the welfare rolls of the very tribes that here argue for a result that will avoid such an outcome. As Congress recently observed, "Indian tribes have the primary responsibility for protecting and ensuring the well-being of their members. . . ." 25 U.S.C. § 2401(12). Ironically, the tribes will

then turn to the federal government, not the state governments or their political subdivisions, for the assistance they need to relieve their burden. It cannot be that Congress intended such a ghost of the GAA to survive in this form.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for the Ninth Circuit should be reversed regarding the applicability of the *ad valorem* taxes on Indian and tribal fee lands within the reservation. The decision of the Court of Appeals should be affirmed regarding the invalidity of the excise taxes on transactions involving such lands.

Respectfully submitted,

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